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No. 495

In the

Supreme Court of the United States

OCTOBER TERM, 1959

CHARLES D. STUART, *et al.*,

Appellants,

v.

WILL WILSON, ATTORNEY GENERAL OF TEXAS,
and
TEXAS STATE BOARD OF MEDICAL EXAMINERS,
and
HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,

Appellees.

On Appeal From the United States District Court for the Northern District of Texas, Dallas Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

Respectfully presented herewith by the Appellants is the jurisdictional statement in this case, to-wit:

OPINION BELOW

Appended hereto as Appendix Ia and Ib, respectively, is the Opinion and Judgment in this case, rendered by the

United States District Court for the Northern District of Texas, Dallas Division, per the Honorable T. Whitfield Davidson, United States District Judge. It is unknown at this time if such Opinion and Judgment will be reported officially or unofficially.

JURISDICTION

A concise statement of the grounds on which the jurisdiction of this court is invoked is as follows:

The nature of this proceeding is that it is a *plea for the preservation of medical freedom.* The case was initially instituted by the 92 Appellants in the federal district court by way of a Complaint and Petition for Permanent Injunction and Application for Temporary Restraining Order and Temporary Injunction and the Appellants further sought by their pleadings the convening of a three-judge District Court to hear their cause of action. The gist of the Appellants action is that they are Naturopathic physicians pursuing a lawful occupation, and the Appellees under color of a set of Texas State Statutes and/or a Texas State constitutional provision are depriving and attempting and/or threatening to deprive the Appellants of their Federal Constitutional and statutory rights, privileges and immunities to pursue their lawful occupation. The Appellants contend that the Texas Statutes (The Texas Medical Practice Act, Articles 4495-4512, Texas Revised Civil Statutes, 1925, as amended to date) (See Appendix II) and the Texas Constitutional provision (Section 31 of Article 16 of the Constitution of the State of Texas, 1876) (See

Appendix III), under color of which the Appellees are depriving, attempting and/or threatening to deprive Appellants of their rights, privileges and immunities to pursue their lawful occupation, are contrary to, in contravention of, and violate the provisions of the Constitution and laws of the United States, particularly the Preamble, Section 2 of Article IV and Article VI of the Constitution of the United States and Section 1 of the XIV Amendment thereto; the Anti-Trust laws and laws against monopolies and combinations in restraint of trade (Title 15, U. S. C. A., Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26 and 44), and the Civil Rights Act of the United States (Title 42, U. S. C. A., Sections 1983-1985). In the alternative, Appellants allege that they are not subject to nor controlled by the said Texas Medicine Practice Act, under color of which the Appellees are depriving, attempting and threatening to deprive the Appellants of their rights, privileges and immunities guaranteed them by the Constitution and its amendments and laws of the United States. The Appellants' action was instituted under the provisions of the Federal Civil Rights Acts, Title 42, U. S. C. A., 1983-1985 and the requirements for a three-judge court, Title 28, U. S. C. A. 2281-2284.

The date of the judgment sought to be reviewed (Appendix Ib) is July 25, A. D. 1959, There were no rehearings held in the case. The notice of appeal was filed on August 28, A. D. 1959 in the United States District Court for the Northern District of Texas, Dallas Division.

The statutory provision which confers jurisdiction of this appeal on the Supreme Court of the United States is Title 28, U. S. C. A., Section 1253.

This case is brought under and falls within both the Civil Rights Statutes (Title 42, U. S. C. A., Sections 1983-1985) and the statutes providing for an injunction against enforcement of an unconstitutional state statute which requires a three-judge court (Title 28, U. S. C. A., Sections 2281, 2284). Since this case comes within the purview of the aforesaid statutes, this case is reviewable by the Supreme Court (Title 42, U. S. C. A., Section 1984) and the Supreme Court has jurisdiction of a direct appeal in this case because this appeal is from an order denying, after notice and hearing, an interlocutory and permanent injunction in a civil action which is required by an Act of Congress to be heard and determined by a District court of three judges (Title 42, U. S. C. A., Section 1253). Because it is believed that the plain wordings of the statutes are sufficient, no cases are cited to sustain the jurisdiction of the Supreme Court to review this case on direct appeal.

Involved is the validity of the statutes of the State of Texas known as the Texas Medical Practice Act, Articles 4495-4512, Texas Revised Civil Statutes 1925, as amended to date (the pertinent articles are set forth in Appendix II) and which are found in Volume 13 on pages 533-556, and in the 1958 pocket part thereto on pages 70-80, of Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, as amended to date. Also involved is the validity of Section 31 of Article 16 of the Constitu-

tion of the State of Texas of 1876, as amended to date (See Appendix III) which is found on page 246 of Volume 3 of Vernon's Annotated Constitution of the State of Texas, publication of 1955, with annual pocketparts.

QUESTIONS PRESENTED BY THE APPEAL

The questions presented by the appeal are as follows:

1. Does this civil action contain a substantial federal question warranting the exercise of jurisdiction by the Federal District Court?

2. Does this civil action contain a substantial federal question warranting the exercise of jurisdiction by a Three-Judge District Court?

3. Are facts alleged which entitled the Appellants to relief in this civil action?

4. Does the Federal District Court and/or Three-Judge District Court have jurisdiction of this case because the fundamental rights of the Appellants guaranteed by the Constitution of the United States of American have been violated and are threatened to be violated because the Texas Medical Practice Act (Articles 4495-4512, Texas Revised Civil Statutes 1925, as amended to date) (See Appendix II), as interpreted and enforced by the Texas Courts and the Appellees herein, and the acts and conduct of the Appellees in prosecuting and threatening to prosecute suits against Appellants under color of such Act to enjoin Appellants from practicing their profession of the specialty of Naturopathy under the guise of prohibiting

them from practicing the unlimited and all-inclusive practice of medicine or allopathy abridge the Appellants' privileges and immunities, deprive them of property without due process of law, and deny them the equal protection of the laws, in violation of Article 4, Section 2, and Article 6 of the Constitution of the United States, and Section 1 of the 14th Amendment thereto, and where the injunction sought for by Appellants is provided for under the Civil Rights Acts, Title 42, U. S. C. A., Sections 1983-1985?

5. Is Nauropathy a recognized *limited* healing art whereby the practitioner thereof diagnoses and treats patients to stimulate and restore natural bodily processes and functions using a system of practice that employs physical, mechanical, chemical, and psychological methods and who utilizes dietetics, exercise, manipulation, chemical substances naturally found in or produced by living bodies, and healing properties of air, light, water, heat, and electricity, and who provides for care of bodily functions, processes or traumas, and treats nervous or muscular tension, abnormalities of tissues, organs, muscles, joints, bones, and skin, pressure on nerves, blood vessels, and lymphatics, and who assists patients in making adjustments of a mental and emotional nature and which limited healing art excludes the use of major surgery, x-ray, and radium for therapeutic purposes, and the use of drugs with exception of those substances which are assimilable, contain elements or compounds which are components of bodily tissues, and are usable by body processes for maintenance of life, as contradistinquishable from the Allopathic (all-

inclusive) practice of medicine such as defined in the said Texas Medical Practice Act?

6. Is Article 16, Section 31 of the Constitution of the State of Texas which provides, "The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for mal-practice, but no preference shall ever be given by law to any schools of medicine," unconstitutional as being repugnant to the Constitution of the United States and Amendments thereto, because the Texas Courts have construed such Texas Constitutional Provision as meaning that the Legislature of the State of Texas can require Naturopath physicians to take the same examination as the Allopathic physicians to obtain a certificate to practice his profession, when the Allopathic school of medicine is entirely separate and distinct from the Naturopathic school of medicine and when the Naturopathic school of medicine is a limited and special branch of the healing art and when many of the Allopathic practices are repugnant to and abhorred by the Naturopathic school of medicine and where the Texas Courts have further construed said provision of the Texas Constitution to mean that the Naturopath has to be examined on synthetic toxic drugs, major surgery, and the use of x-ray and radium equipment for therapeutic purposes when such practice and subjects are not included within nor embraced by the Naturopathic school of medicine and when the interpretation of said provision of the Texas Constitution is meant to mean that the Naturopaths cannot practice their profession whose theories, philosophies and practices

have been developed to a high degree of therapeutic efficiency by the Naturopaths persistently maintaining the efficiency of their own philosophy, because to practice Naturopathy in Texas according to said Constitutional provision, the Texas Courts have held that the Naturopath cannot be examined in his own philosophy and theories of its school of medicine but must turn their backs on their own theories, philosophies, and school of medicine and study and be examined on the theories, philosophies, and school of medicine of the Allopaths and where such requirement is arbitrary, discriminatory, and therefore unconstitutional in its operative effect because it violates Section 1 of the 14th Amendment to the Constitution of the United States of America which says that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law?"

7. Is the Naturopathic profession, whose fundamental concept is largely nutritional, i.e. to build, balance, and normalize the human body and whose practitioners place considerable emphasis upon the science of nutrition and the use of natural foods in their natural states and which profession is not of itself inimical to the health and welfare of the people and whose practitioners are not nuisances per se, a lawful profession; and is the right to follow and practice such profession a property right and one of the fundamental rights of citizenship; and is such right to

follow and practice the Naturopathic profession, business or occupation, a right protected by the Contitution of the United States within the meaning and intent of the provisions of Section 1 of the 14th Amendment of the Constitution of the United States of America which says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law," and is such right included within the constitutional guaranty set forth in its preamble to the right to liberty and the pursuit of happiness?

8. Is the Texas State Board of Medical Examiners authorized to issue licenses to the Appellants of the limited field of Naturopathy?

9. Is Naturopathy a nuisance per se?

10. Is the practice of Naturopathy inimical to the health and welfare of the people?

11. Can the Appellees force the Appellants to qualify as a general physician and surgeon in order to practice the more limited system of healing known as Naturopathy?

12. Is Naturopathy a recognized lawful field of the healing arts? _____.

13. Do the Appellees have the authority to prohibit the practice of the limited system of healing known as Naturopathy?

14. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Appellees herein, unconstitutional because it violates Section 2 of Article 4 of the Constitution of the United States of America which provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States?"

15. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Appellees herein, unconstitutional because it violates Article 6 of the Constitution of the United States of America which provides that, "This Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the Constitution and laws of any State to the contrary not withstanding?"

16. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Appellees herein, arbitrary and discriminatory and unconstitutional in its operative effect when applied to the Appellants who are Naturopathic physicians, and is said Texas Medical Practice Act, unconstitutional because it violates Section 1 of the 14th Amendment to the Constitution of the United States which says that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the law?"

17. Is the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Appellees herein, void and unenforceable as class legislation because it violates the "Civil Rights Act" of the United States (Title 42, U. S. C; A., Section 1983) in any of the following respects:

a. By arbitrarily requiring Naturopaths to pass examinations in non-naturopathic subjects in order to qualify to practice Naturopathy?

b. By prohibiting the practice of Naturopathy without showing it to be detrimental to the public or inherently harmful?

c. By unfairly discriminating against Naturopaths in the conferring of exclusive jurisdiction and control over these non-allopathic medical practitioners on their allopathic medical competitors,

d. By creating a monopoly by giving allopaths ascendency and control over the limited school of Naturopathy and the power to prevent naturopathic physicians from practicing in violation of the federal statutes pertaining to Monopolies and Restraint of Trade (Title 15, U.S.C.A. Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26, and 44)?

e. By usurping the power of the State to pass on the qualifications of, issue license to, and control of naturopathic physicians?

f. By restricting the rights of the citizens who have faith in and desire treatments by methods not based on the philosophy of that organization (allopathic school) practicing under the Texas Medical Practice Act?

g. By usurping power to suspend a law in violation of Article 1, Section 28 of the Constitution of the State of Texas?

18. Does the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Appellees herein, constitute an invalid exercise of the police power in that it bans or prohibits the practice of Naturopathy, a successful recognized harmless system of healing, under the guise of regulating or controlling it?

19. Does the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Appellees herein, arbitrarily interfere with the rights of the Appellants herein by imposing unnecessary restrictions upon their pursuing a lawful trade and occupation, to-wit, the practice of Naturopathy?

20. Does the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Appellees herein, violate and repudiate the "due process" and "equal protection" guarantees of the Law of the Land?

21. Is that part of Section 31 of the Constitution of the State of Texas, 1876, which provides as follows:

> "But no preference shall ever be given by law to any schools of medicine."

as interpreted and enforced by the Courts of the State of Texas and the Appellees herein, void as being contrary to the Constitution of the United States and the Federal Civil Rights Statutes, because among other things the Supreme Court of Texas has held that the aforesaid portion of the Texas Constitution is construed to mean that a Naturo-

path, who follows a limited and separate school of medicine from the allopathic, allopathic-homeopathic, allopathic-eclectic, and allopathic-osteopathic schools of medicine, must obtain a license from the Texas State Board of Medical Examiners, which Board is composed of followers of allopathic, allopathic-homeopathic, allopathic-eclectic, allopathic-osteopathic schools of medicine, and because such Board examines only in the aforesaid schools of medicine and such Board is not prepared, equipped nor learned in the naturopathic school of medicine, and which Board is not authorized to issue a license to practice Naturopathy?

22. Is the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of Texas and Appellees herein, void as being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States of America, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States?

23. Does the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of Texas and the Appellees herein, under the guise of protecting public interests and an alleged exercise of police power, illegally and arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations in violation of said Section 1 of the 14th Amendment to the Constitution of the United States of America?

24. Is the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of the State of Texas and the Appellees herein, unconstitutional in view

of said Section 1 of the 14th Amendment to the Constitution of the United States of America because said portion of the Texas Constitution is an arbitrary, unreasonable abridgment of Appellants'-citizens' rights and privileges and an invasion of their liberty to engage in lawful business, because of unreasonable requirements, onerous burdens impossible to perform, not fairly applicable, and prohibitive?

25. Is the Texas Naturopathic Law (Article 4590d) valid?

26. Assuming that the aforementioned Texas Medical Practice Act and Section 31 of Article XVI of the Constitution of the State of Texas are not violations of the Constitution and laws of the United States, does such Texas Medical Practice Act and Texas provision restrict the Appellants from practicing Naturopathy, a lawful occupation, and are the acts and conduct of the Appellees acting under the color of said Texas Medical Practice Act and the aforesaid portion of the Constitution of the State of Texas in filing suits, prosecuting and threatening to file suits against Appellants to prevent Appellants from following their lawful profession, a violation of the Appellants' Civil Rights as guaranteed to them by the Federal Statutes, and particularly Title 42, Section 1983, U. S. C. A. which provides for civil action for deprivation of rights, and which says that, "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State of Territory, subjects of cause to be subjected, any citizen of the United States or other person within the jurisdiction there-

of to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress?"

27. Are the Appellants entitled to a Temporary and Permanent Injunction against the Appellees because of the Appellees' illegal actions in obtaining and intending to obtain injunctions, fines and forfeitures against and imprisonment of Appellants herein, and because the Appellants are now and are threatened to continue to be greatly harmed, damaged, imprisoned and injured by the said illegal, wrongful, knowing and purposeful acts of the Appellees, and because Appellants have no plain, adequate or efficient remedy at law to redress the said wrongful, knowing and purposeful acts of the Appellees other than by injunction, and because any other remedies to which they could be remitted would be attended by uncertainties, would involve a multiplicity of suits and would cause the Appellants irreparable harm and injury and occasion undue hardship, vexation and delay, and because such temporary and permanent injunction should be issued because the Appellants will suffer immediate and irreparable injury, harm, damage, imprisonment, forfeitures, and fines?

28. Is medical freedom guaranteed by the Constitutions of the United States of America and the State of Texas and their respective Amendments?

STATEMENT OF THE CASE

A concise statement of the case containing the facts material to the consideration of the questions presented is that the Appellants (Petitioners in the Court below) are Naturopath physicians and pursue the practice of Naturopathy, an occupation defined in the Dictionary of Occupational Titles, U. S. Department of Labor, as follows:

> "DOCTOR, NATUROPATHIC (Medical Ser.) 0-52.21. naturopath. A HEALER. Diagnoses and treats patients to stimulate and restore natural bodily processes and functions using a system of practice that employs physical, mechanical, chemical, and psychological methods: Utilizes dietetics, exercise, manipulation, chemical substances naturally found in or produced by living bodies, and healing properties of air, light, water, heat, and electricity. Provides for care of bodily functions, processes or traumas, and treats nervous or muscular tension; abnormalities of tissues, organs, muscles, joints, bones, and skin; pressure on nerves, blood vessels, and lymphatics; and assists patients in making adjustments of a mental and emotional nature. Naturopathy excludes the use of major surgery, x-ray and radium for therapeutic purposes, and use of drugs with exception of those substances which are assimilable, contain elements or compounds which are components of bodily tissues, and are usable by body processes for maintenance of life."

The Appellees have filed civil and criminal suits, and have threatened to file other suits against Appellants in an effort to punish, imprison, fine, harm, injure, humiliate, enjoin and prevent the Appellants from pursuing their lawful occupation. The Appellants contend that they have a right to pursue a lawful occupation and that such right

is guaranteed them by the Constitution and laws of the United States as alluded to hereinbefore. The Appellees contend that Appellants before they can practice as naturopaths have to take the same examination as the Allopaths. On the other hand, the Appellants contend that naturopathy is a *limited* school of the healing arts and that the aforementioned examination for general allopathic medical practitioners and surgeons is on many subjects not practiced by the Naturopath and in some instances on subjects abhored by and contrary to the tenets, principles, and teachings of the Naturopath school of medicine. The Texas Legislature passed a law regulating the practice of Naturopathy (Vernon's Annotated Revised Civil Statutes of Texas, Revision of 1925, as amended to date, Article 4590d) prescribing courses and examinations for a Naturopath physician. The course of study prescribed is actually longer than that for the allopath physician. However, the Appellees and the Courts of Texas have refused to recognize such law as valid, and the Appellees have entered upon a course of persecution of the Appellants. It is admitted by the Appellants that the State of Texas can regulate various professions; but at the same time, Appellants contend that such regulations are subject to the restrictions placed upon it by the Constitution and laws of the United States; and that the State of Texas and its officials and Boards cannot under the guise of protecting public interest arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations; and that the laws of Texas cannot be an arbitrary, unreasonable abridgement of citizens' rights and privileges and an in-

vasion of their liberty to engage in lawful business, because of unreasonable requirements, onerous burdens impossible to perform, not fairly applicable and prohibitive.

Appellants further state that because they are now and are threatened to continue to be greatly harmed, damaged, imprisoned and injured by the said illegal, wrongful, knowing and purposeful acts of the Appellees, and because Appellants have no plain, adequate or efficient remedy at law to redress the said wrongful, knowing and purposeful acts of the Appellees other than by injunction, and because any other remedies to which they could be remitted would be attended by uncertainties, would involve a multiplicity of suits and would cause Appellants irreparable harm and injury and occasion undue hardship, vexation and delay, that a temporary and permanent injunction should be issued in this case because the Appellants will suffer immediate and irreparable injury, harm, damage, imprisonment, forfeitures and fines.

Appellants contend that the lower court should have immediately notified the Chief Justice of the United States Court of Appeals for the Fifth Circuit of the filing of Appellants' pleadings in this case and that a three-judge court should have been designated and convened to hear this case and declared that the aforementioned Texas Medical Practice Act and/or portion of Section 31 of Article XVI of the Texas Constitution were unconstitutional, void, not effective and not operative against the Appellants in view of the Preamble, Section 2 of Article IV and Article VI of the Constitution of the United States and Section 1 of the XIV

Amendment thereto, the Anti-Trust laws and laws against monopolies and combinations in restraint of trade (Title 15, U. S. C. A., Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26, and 44), and/or granted the injunctive relief prayed for by Appellants whereby the Appellees, their agents, servants, employees and successors in office, and those in concert with them would be enjoined from (1) prosecuting, filing and threatening to file Civil and/or Criminal suits against the Apppellants to prevent Appellants from practicing Naturopathy, (2) and/or preventing, filing and/or threatening to file Civil and/or Criminal suits against the Appellants for practicing Naturopathy, (3) and/or interfering with and/or molesting Appellants in the practice of Naturopathy, in view of the Civil Rights statute (Title 42, U. S. C. A. Section 1983-1985.)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This suit challenges the constitutionality or validity of state statutes and a constitutional provision of the State of Texas all in view of the Constitution and laws of the United States, a question jealously regarded as exclusively its own by the Supreme Court of the United States. This suit also involves human rights and human liberties under the protection of the Federal Constitution and Laws and such rights and liberties are always a proper subject for review by the Supreme Court.

The right to follow and practice a profession is a property right and is one of the fundamental rights of citizenship. A person's business, profession or occupation is

properly within the meaning and intent of the constitutional provision requiring due process of law, and is included within the right to liberty and the pursuit of happiness guarantees. *Adams v. Tanner, 244 U. S. 590, 61 L. Ed. 1336, 37 S. Ct. 662, 665.*

This Court should also consider that the right and freedom of citizens of the United States to have their human ills treated by Naturopathic therapies and practitioners is especially precious—in fact, absolutely essential to the well-being of those patients who cannot use drugs or medicines. Thus, this case is a matter of national concern.

The right to practice Medicine, a fortiari Naturopathy, is like the right to practice law or carry on a trade. As Mr. Douglas of this Court emphasized in *Barsky v. Board of Regents of the University of New York, 347 U. S. 442, 98 L. Ed. 829, 74 S. Ct. 650,* this right is a priceless part of the liberty of an individual. It may mean more than property. Such a right is protected by our Federal Constitution from arbitrary infringement, which forbids any state to deprive a person of liberty or property without due process of law.

The right to work is the most valuable liberty that a man possesses. Man has, indeed, as much right to work as he has to live, to be free or to own property.

Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of their vitality and efficacy and leads to a gradual depreciation and deterioration of

such rights. It is the duty of the Court to be watchful for the constitutional rights of the citizens and protect such rights against any stealthy encroachments thereon. As was stirringly stated in *Gulf, Colorado & Santa Fe Railway Co. v. W. H. Ellis, 165 U. S. 150, 41 L. Ed. 666, 17 S. Ct. 255, 256*, the Court's motto should be "Obsta Principies."

At common law the practice of medicine was open to all who desired to follow it in any of its branches, subject only to liability for damages in a case of lack of skill on the part of the practitioner, and to the right of the government to proceed by quo warranto to prevent incompetents from following the business *(State v. Borah, 51 Ariz. 318, 76 P. 2d 757, 115 A. L. R. 254)*. And, as a general proposition, the right to follow the profession of medicine and surgery as a lawful occupation is one of the fundamental rights of citizenship *(People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A. L. R. 703; State v. District Court, 26 Mont. 121, 66 Pac. 754, 755)*—a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured *(Hewitt v. State Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Ann. Cas. 750; Chenoweth v. State Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L. R. A. (N. S.) 958, Ann. Cas. 1915 D. 1188; People v. Love, supra)*. It is beyond the power of a state to prohibit the practice of medicine and surgery, or any of the *limited* systems thereof, in the absence of any showing of injury, or tendency of injury to the public health, safety or morals *(State v. Armstrong, 38 Idaho 493, 255 Pac.*

491, 33 A. L. R. 835; State v. Biggs, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139, 98 Am. St. Rep. 731). Likewise, the Legislature cannot under the present state of general medical knowledge, restrict all healing to any one school of thought or practice. *State v. Biggs, supra.* However, the state may under its police powers prescribe *reasonable* controls on the general practice of medicine and surgery as affecting the health and welfare of the people; and similarly, the state may *regulate, within reasonable bounds,* a recognized, useful, *limited* system of the healing art, but it cannot prescribe such arbitrary and unreasonable requirements which will contravene the Constitution and laws of the United States and amount to a denial of due process or of equal protection of the laws under the Fourteenth Amendment. See *England, et al. v. Louisiana State Board of Medical Examiners, et al (Fifth Circuit —Sept. 9, 1958), 259 F. 2d 626 (June 1, 1959), 359 U. S. 1012, 3 L. Ed. 2d 1036, 79 S. Ct. 1149 (Jan. 23, 1959), 263 F. 2d 661.*

The right to follow the profession of medicine and surgery is one of the fundamental Rights of Citizenship *(People v. Love,* supra, p. 811). A person's business, profession or occupation is at the same time "property", within the meaning of its constitutional provision as to due process of law, and is also included in the right to liberty and the pursuit of happiness. *Butcher's Union Slaughterhouse Co. v. Crescent City Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; People v. Love,* supra, p. 811.

We must therefore in this consideration treat Naturopathy as a useful and lawful business, science, or profession, and not as one dangerous or unlawful in its exercise, and subject to abatement or destruction by unreasonable and arbitrary requirements, but as a profession or business that may be regulated by provisions prescribing reasonable requirements of those who apply to practice that profession, without unlawful or unjust discrimination. (See *People v. Love, 811.)*

It is a matter of common knowledge that the Allopaths, sometimes referred to as the "knife and drug" doctors, have been attempting to extinguish the other schools and philosophies of medicine. *People v. Love*, supra. The Allopaths have practically absorbed the Eclectics and Homeopaths, and are maintaining a constant war to ostracize the Osteopaths. The Naturopaths have fallen victims to the Allopaths in many places; however, the Naturopaths are still permitted to practice in several states and in the District of Columbia. The Naturopaths whose philosophy is to treat the cause of illness by natural methods to put the human body back in balance and thus eliminate the illness is an age-old philsophy of medicine that should be preserved. The Naturopathic school of medicine is a *limited field* of medicine and *does not* include the use of synthetic toxic drugs, major surgery, and X-ray and radium equipment for therapeutic purposes, but it does include those theories and practices of treatment by natural means which have been developed to a high degree of therapeutic efficiency by the Naturopaths persistently maintaining the

efficacy of their own philosophy. As stated previously, the Naturopathic system of healing is a *limited system*. Its adherents ut lize air, light, water, manipulation and electricity and other means as set forth in the hereinbefore mentioned Occupational definition, in the treating and in the handling and care of abnormality—it is the *minor* scope of attention to distortion, disrelationship, and deficiencies, a *narrow* and *limited* specialty rather than the all-inclusive comprehensive practice of diagnosing and treating all diseases, as done by the major Allopathic school of the practice of medicine as an art. Naturopathic physicians do not practice, advocate or champion the unlimited practice art to all phases and aspects of disease and Naturopathic physicians are circumscribed and defined as set forth above. They administer the organic products of nature as healing agents. The fundamental concept being largely nutritional, i.e. to build, balance and normalize the human body. Accordingly, the Naturopathic practitioners place considerable emphasis upon the science of nutrition and the use of natural foods in their natural states. It cannot be said that such a system as this is of itself inimical to the health and welfare of the people, nor is it a nuisance per se. [*State of Missouri, ex rel Richard K. Phelps, Prosecuting Attorney in and for Jackson County, Missouri v. William Scopel, Case No. 570,960 in the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 2 (Appendix IV); Missouri Veterinary Medical Assn. v. Glasan (Mo. App.), 230 S. W. 2d 169; People, ex rel v. Universal Chiropractic Assn., et al., 302 Ill. 228, 134 N. E. 4; Dean v. State, 151 Ga. 371, 106 S. E. 792.*]

Even the Allopaths are discovering the value of this age-old school of naturopathy. Witness the words of Dr. Ray Lyman Wilbur, M.D., as Chairman of the Council on Medical Education and Hospitals before the Fortieth Annual Congress on Medical Education and Licensure, held in Chicago on February 14, 1944, "New treatments make use of heat, cold, water, electricity, and specific manipulations. * * * They bring biological responses more potent than many of the drugs gathered through centuries by trial and error. * * * Medicine based on pills and potions is becoming obsolete. * * * The physiology, with the help of physics, has taught us many ways to deal with the human body that were dreamed of only a decade ago by us, but comparatively successfully pursued by those of the irregular schools. * * * The medical profession will profit by recognizing this new concept, and must insist that its schools promptly mold their instruction to conform with the new knowledge of body mechanics. * * *." The Journal of The American Medical Association, March 25, 1944, Vol. 124, pp. 815 and 816.

From time to time courts in the United States have considered the problem of whether a Naturopathic physician should be required to have a regular medical doctor's license to practice Naturopathy. It appears that the key to the answer to this problem is that the school of naturopathy is a *limited* school of medicine and as such this limited system of healing practice should be distinguished from the general system relating to the practice of medicine and surgery; and the qualifications to practice Naturopathy

cannot be measured by the standards required of allopathic physicians and surgeons. *People v. Love (Supreme Court of Illinois, June 22, 1921), 298 Ill. 304, 131 N. E. 809; State v. Biggs, 133 N. C. 729, 46 S. E. 401, 41 Am. Jur. 135; State v. Armstrong, 38 Idaho 493, 255 Pac. 491; Stribling v. Jolley (Sup. Court of Mo., en Banc., Jan. 14, 1952), 245 S. W. 2d 885, 362 Mo. 995; Stribling v. Jolley. 253 S. W. 2d 519 (Mo. App.); Healing Arts Practice Act, D. C. 1928, 45 Stat. 1326, 1951 Code, D. C., T. 2.*

It is admitted that the practice of Naturopathy can be controlled by state law, but to require the practitioners of this limited system of the healing arts to qualify for and obtain a regular medicine license required of allopathic physicians and surgeons is a deprivation of their rights, privileges and immunities to pursue their lawful occupation, which rights, privileges and immunities are guaranteed the naturopaths under the Constitution and laws of the United States. See *State of Idaho ex rel State Board of Medicine of the State of Idaho, S. M. Poindexter, Chairman, Plaintiff-Appellant v. David Smith, Defendant-Respondent (Supreme Court of Idaho, April 8, 1959), 337 Pac. 2d 938-942.* This latter case is so directly in point that the body of the opinion therein is made as part of this Statement as to Jurisdiction and appended hereto as Appendix V.

Appended hereto are the opinions and judgment of the court (Appendices Ia and Ib, respectively) which are sought to be reviewed.

CONCLUSION

The unlawful action taken by the Appellees is serious and involves not only the federal constitutional rights of the Appellants but the health and welfare of many, many citizens of the United States who benefit from treatment by the Naturopathic system of healing. The time has come for the United States Supreme Court to take cognizance of this growing threat to medical freedom and the grave federal constitutional questions involved in this case. Because of the gravity of this situation which is so touched with the public health and welfare, it is respectfully submitted that this matter requires plenary consideration with briefs on the merits and oral argument for its resolution.

In order that Justice may be achieved, it is respectfully urged that this Court should exercise its jurisdiction and set this matter down for plenary consideration with oral argument and render its decision on the admitted facts and pleadings in this case and issue a permanent injunction against the Appellees enjoining and restraining the Appellees from interfering with or molesting the Appellants in the lawful pursuit of the practice of Naturopathy; that in its opinion the State of Texas can in the future if it so desires pass laws reasonably regulating the practice of Naturopathy; and that the costs in this case be taxed against the Appellees; and or in the alternative that this Honorable Court reverse the decision of the District Court with instructions that a three-judge court be appointed to hear the case on its merit under the provisions of Title 28, U. S. C. A. Sections 2281 and 2284; with the further

instruction that Naturopathy is a lawful occupation; that Naturopathy is a *limited* field of the healing art; that Naturopathic practitioners in order to practice should not be required to qualify for and obtain a regular Medical license required of Allopathic physicians and surgeons because to do so would be illegally and arbitrarily interfering with the Naturopathic limited school of medicine and the placing of unreasonable and unnecessary restrictions and requirements upon a lawful occupation, and the imposition on the Naturopaths of onerous burdens impossible to perform, not fairly applicable, unjustly discriminatory, and prohibitive, and which will amount to a deprivation of the Appellant-Naturopath's rights, privileges and immunities to pursue their *lawful* occupation; all in violation of the Preamble to the Constitution of the United States, Section 2 of Article IV, and Article VI of the Constitution of the United States and Section 1 of the XIV Amendment thereto, and the Anti-Trust laws and laws against monopolies and combinations in restraint of trade (Title 15, U. S. C. A., Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26, and 44); that the Texas Medical Practice Act, Articles 4495-4512, Texas Revised Civil Statutes, 1925, as amended to date and that the appropriate Section 31 of Article 16 of the Constitution of the State of Texas of 1876 as amended to date which provides that "no preference shall ever be given by law to any schools of medicine" as interpreted by the Courts of the State of Texas be declared unconstitutional, void; not effective and not operative against the Appellants in view of the aforesaid Preamble to the Constitution of the United States, Section 2

of Article IV, and Article VI of the Constitution of the United States and Section 1 of the XIV Amendment thereto, and the Anti-Trust laws and laws against monopolies and combinations in restraint of trade (Title 15, U. S. C. A., Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26, and 44); and/or the aforesaid Texas Medical Practice Act and/or the said portion of the Texas Constitution as construed by the Courts of Texas do not apply to the *limited* field of the Naturopathic healing art; and/or that the case be heard on its merits and that the three-judge court proceed on the Appellants First Amended Complaint and Petition for permanent injunction and application for Temporary Restraining Order and Temporary Injunction under the Civil Rights Acts (Title 42, U. S. C. A., Section 1983-85); and for such other and further relief, both special and general, in law and equity, to which the Appellants are justly entitled.

Respectfully submitted,

JAMES L. MCNEES, JR.,
407 Davis Building,
1309 Main Street,
Dallas, Texas,
RIverside 2-5200.

PROOF OF SERVICE

I, James L. McNees, Jr., attorney of record for CHARLES D. STUART, et al., Appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the day of October, A. D. 1959, I served copies of the foregoing Statement of Jurisdiction on the several parties in this case, as follows:

1. On WILL WILSON, Attorney General of the State of Texas, and TEXAS STATE BOARD OF MEDICAL EXAMINERS, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to WILL WILSON, Attorney General of Texas, his own counsel and who is also counsel of record for Texas State Board of Medical Examiners, and which envelope was addressed to WILL WILSON, Attorney General of Texas, Capitol Station, Austin 11, Texas.

2. On HENRY WADE, District Attorney of Dallas County, Texas, by mailing a copy in a duly addressed envelope, to HENRY WADE, Criminal District Attorney, County Courthouse, Dallas, Texas.

JAMES L. MCNEES, JR.,
Attorney for Charles D. Stuart, et al., Appellants.
407 Davis Building,
1309 Main Street,
Dallas, Texas,
RIverside 2-5200.

APPENDIX Ia

In the

District Court of the United States

For the Northern District of Texas,
Dallas Division

CHARLES D. STUART, *et al.*,

v.

WILL WILSON, ATTORNEY GENERAL OF TEXAS, TEXAS STATE BOARD OF MEDICAL EXAMINERS, HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY

No. 8084—Civil

Filed 27 day of August 1959.

July 25, 1959

THE COURT: We have read the pleadings in the case and we have your statements.

It is in the nature very much like litigation we had when the other branches of medicine and those that had the idea of presenting the branches of healing have come along. Christian Science had some battles of this kind, and the chiropractor had his fight.

I believe the chiropractors' troubles have been eliminated by giving him a board of examiners, but he was supposed

to attain certain medical and certain other information which justified his practice under the law.

I believe that the Legislature has not granted a naturopath what the chiropractor is given under the law. I believe that your real remedy is going to have to ultimately be with the State Legislature and with the courts of your state.

I can understand the great realm of nature, not only does it enter the medical profession but it enters the legal profession. The laws of nature are sometimes very much transgressed by legislative bodies and by our courts, but we cannot make water run uphill, and these matters of healing by nature, the Redman had them before we got here with our science, even the animals and the beasts of the fields have them.

I used to have a pointer dog I was very much attached to, and at times he would go out and graze on the wheat like a cow, he thought he was sick. At other times he would find a certainty variety of clay and he would eat that because he thought he was healing himself. I don't think either of them did any good, but he believed it did.

And our parents, from the uneducated races of man, learned to heal certain diseases that nature taught them.

I remember my grandmother had a great number of slaves, and they had their remedies, and she attended her own family and looked after the medical wants of the slaves, and she used all of the natural home remedies, and when the home remedies didn't do the job she went and got a doctor to finish the work.

So all these things have been here all along and no one should look upon them with scorn, but the Legislature does have a right to say, regardless of what school you are from, you ought to have certain knowledge concerning the human anatomy and concerning the effects of these plants and so forth.

A great many men can be poisoned by poison ivy at a certain season of the year if they walk in the tall grass poison oak will break out around their ankles.

I remember a little cocker spaniel some of my family were very much attached to, and we had to take him to a veterinarian occasionally. The veterinarian said he was allergic to certain grass.

I remember when some of our older people found remedies in the forest. The elm tree had certain medical properties, not the red elm, but the species we call the slippery elm, and they used certain portions of it as quinine, but they later got capsules to hold the quinine, and then these modern scientific fellows decided quinine was not a remedy for any disease, and we don't see quinine very often.

So all of these things are with us.

Your position puts the Court very much in the attitude of another attorney here who has filed a suit to enjoin all of the district judges down here from doing certain things.

We don't feel that we have jurisdiction to supervise the state courts.

The very nature of your suit is one that you would appeal from the court where you have this Medical Practice Act

that has been brought to bear on you, you would appeal to a higher state court. If it is brought in a criminal way then you would go to the Court of Criminal Appeals. If they turn you down, and there is a federal question in it, then you should go directly to the Supreme Court of the United States.

If it was a civil case and the Supreme Court turned you down you could go directly to the Supreme Court of the United States.

You ask this court to tell the Attorney General he cannot proceed or to tell the District Attorney he cannot proceed, which would virtually make the federal court an appellate court or a supervisory court over the state court, and while that might seem desirable in this instance it would be bad because it would virtaully destroy our state courts. Every time a fellow didn't like a decision in the state court he would come up here and ask me to overturn it.

The state court was here a long time before there was a federal court. In fact, in colonies like Virginia and Massachusetts they were having courts one hundred and fifty years before we had a Constitution of the United States or had a federal court.

It is the Court's opinion that the motion to dismiss this case will have to prevail.

The suit will be dismissed.

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APPENDIX Ib

In the

United States District Court

For the Northern District of Texas,
Dallas Division

Civil Action No. 8084

CHARLES D. STUART, *et al.*,
Petitioners,

v.

WILL WILSON, Attorney General of the State of Texas,
and
TEXAS STATE BOARD OF MEDICAL EXAMINERS,
and
HENRY WADE, District Attorney of Dallas County, Texas,
Defendants.

ORDER DISMISSING ACTION

On this the 25th day of July, 1959, came on to be heard Plaintiffs' First Amended Complaint and Petition for Permanent Injunction and Application for Temporary Restraining Order and Temporary Injunction, and Defendants' First Amended Motion to Dismiss and to Strike, in the above styled Civil Action on the docket of this Court. Came the Plaintiffs, by and through their attorney, and came the Defendants, by and through their attorney, and

both parties announced ready for the hearing. The Court, having heard both the Plaintiffs' Complaint and Application and the Defendants' Motion and the argument of counsel, is of the opinion, and so finds, that this said Civil Action should be dismissed for lack of a substantial federal question warranting exercise of jurisdiction and no facts are alleged entitling the Plaintiffs to any relief in this said Civil Action.

IT IS, THEREFORE, ORDERED that Civil Action Number 8084, styled Charles D. Stuart, et al, Petitioners, vs. Will Wilson, Attorney General of the State of Texas, and Texas State Board of Medical Examiners, and Henry Wade, District Attorney of Dallas County, Texas, Defendants, be, and the same is, dismissed at the Plaintiffs' costs; and the Clerk of this Court is hereby directed to make the necessary entries on the docket and records of this Court to dismiss this said Civil Action.

SIGNED, ENTERED AND FILED, this 29th day of July, 1959.

/s/ T. WHITFIELD DAVIDSON

T. Whitfield Davidson
U. S. District Judge.

APPENDIX II

The pertinent text of the Texas Medical Practice Act which is involved in this case is as follows:

Article 4495. Medical Board

The Texas State Board of Medical Examiners shall consist of twelve men, learned in medicine, legal and active practitioners in the State of Texas, who shall have resided and practiced medicine in this State, under a diploma from a legal and reputable college of medicine of the school to which said practitioner shall belong, for more than three years prior to their appointment on said Board. No school shall have a majority representation on said Board. Within thirty days after this Act becomes effective, the members of the first Board, as provided in this Act, shall be appointed by the Governor of the State. Of the members first appointed, four shall serve for a term of two years, or until their successors shall be appointed and qualified; four shall serve for a term of four years, or until their successors shall be appointed and qualified; and the remaining four members shall serve for a term of six years, or until their successors shall be appointed and qualified. Thereafter, at the expiration of the term of each member of the Board first appointed, his successor shall be appointed by the Governor of the State, and shall serve for a term of six years, or until his successor shall be appointed and qualified. The present members of the State Board of Medical Examiners, as created by Article 4495, Revised Statutes of 1925, shall remain in office until the members of the Texas State Board of Medical Examiners provided

for in this Act shall have been appointed by the Governor and shall have qualified. No member of said Texas State Board of Medical Examiners shall be a stockholder or a member of the faculty or a board of trustees of any medical school. Vacancies occurring in the Board shall be filled by the Governor. The word "medicine," as used in this Article, shall have the same meaning and scope as is given to it in Article 4510, Revised Civil Statutes of 1925. Acts 1907, p. 224, sec. 1; Acts 1931, 42nd Leg., p. 74, ch. 49, sec. 1.

Article 4498. Physicians to Register

It shall be unlawful for any one to practice medicine, in any of its branches, upon human beings within the limits of this State who has not registered in the District Clerk's office of every County in which he may reside, and in each and every County in which he may maintain an office or may designate a place for meeting, advising with, treating in any manner, or prescribing for patients, the certificate evidencing his right to practice medicine, as issued to him by the Texas State Board of Medical Examiners, together with his age, post office address, place of birth, name of medical college from which he graduated, and date of graduation; subscribed and verified by oath, when, if wilfully false, shall subject the affiant to conviction and punishment for false swearing, as provided by law. The fact of such oath and record shall be endorsed by the District Clerk upon the certificate. The holder of every such certificate must have the same recorded upon each change of residence to another county, as well as in each and every County in which he may maintain an office, or in

which he may designate a place for meeting, advising with, treating in any manner or prescribing for patients; and the absence of such record in any place where such record is hereby required shall be prima facie evidence of the want of possession of such certificate. Acts 1923, p. 292; Acts 1931, 42nd Leg., p. 74, ch. 49, sec. 2.

Article 4501—Examination

All applicants for license to practice medicine in this State not otherwise licensed under the provisions of law must successfully pass an examination by the Texas State Board of Medical Examiners. The Texas State Board of Examiners is authorized to adopt and enforce rules of procedure not inconsistent with the statutory requirements. An applicant, to be eligible for examination, must be a citizen of the United States, or has filed his declaration of intention to become a citizen, and must present satisfactory proof to the Board that he is at least twenty-one (21) years of age, of good moral character, who has completed sixty (60) semester hours of college courses other than in medical school, which courses would be acceptable, at the time of completing same, to the University of Texas for credit on a Bachelor of Arts Degree or a Bachelor of Science Degree, and who is a graduate of a bona fide reputable medical school; a reputable medical school shall maintain a course of instruction of not less than four (4) terms of eight (8) months each; and shall give a course of instruction in the fundamental subjects named in Article 4503 of the Revised Civil Statutes of Texas of 1925; and shall have the necessary teaching force and possess and

utilize laboratories, equipment and facilities for proper instruction in all of said subjects. Application for examination must be made in writing verified by affidavit, and filed with the Texas State Board of Medical Examiners on forms prescribed by the Texas State Board of Medical Examiners accompanied by a fee of Fifty Dollars ($50). All applicants shall be given due notice of the date and place of such examination; provided that the partial examination provided for in Article 4503 of the Revised Civil Statutes of Texas shall not be disturbed by this Article. Provided furthed that all students regularly enrolled in medical schools who graduate are now permitted to take the medical examination prescribed by law in this State shall upon completion of their medical college courses be permitted to take the examination prescribed herein. If any applicant, because of failure to pass the required examination, shall be refused a license, he or she, at such time as the Texas State Board of Medical Examiners may fix, shall be permitted to take a subsequent examination, upon such subjects required in the original examination as the Board may prescribe, upon the payment of such part of Fifty Dollars ($50) as the Board may determine to be reasonable. In the event satisfactory grades shall be made on the subjects prescribed and taken on such re-examination, the Board may grant the applicant a license to practice medicine. The Board shall determine the credit to be given examinees on the answers turned in on the subjects of complete and partial examination, and its decision thereon shall be final. Provided, however, the Secretary may issue a temporary license to practice medicine to an appli-

cant only after he has filed his completed application, together with an additional fee of Ten Dollars ($10), with the Secretary of the Texas State Board of Medical examiners, and that all of the other requirements as required for a permanent license are complied with; such temporary license shall be valid only until the date of the next Board meeting, and at that date the temporary license automatically expires, and is of no further effect. If the applicant fails the examination, no further permit shall be issued until he has successfully passed the examination, or is eligible for and has been granted reciprocity. As amended Acts 1951, 52nd Leg., p. 753, ch. 410, sec. 1, Acts 1953, 53rd Leg., p. 1029, ch. 426, sec. 5.

Article 4503. Details of Examinations

All examinations for license to practice medicine shall be conducted in writing in the English language, and in such manner as to be entirely fair and impartial to all individuals and to every school or system of medicine. All applicants shall be known to the examiners only by numbers, without names, or other method of identification on examination papers by which members of the Board may be able to identify such applicants or examinees, until after the general averages of the examinees' numbers in the class have been determined, and license granted or refused. Examinations shall be conducted on anatomy, physiology, chemistry, histology, pathology, bacteriology, diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence. Upon satisfactory examination conducted as aforesaid under the rules of the Board, applicants shall be

granted license to practice medicine. All questions and answers with the grades attached, authenticated by the signature of the examiner, shall be preserved in the executive office of the Board for one year. All applicants examined at the same time shall be given identical questions. All certificates shall be attested by the seal of the Board and signed by all members of the Board, or a quorum thereof. The Board may in its discretion given examination for license in two (2) part. The first part shall include such of the required scientific branches of medicine abovenamed as may be prescribed by the Board, The second, or final, part of the examination shall not be given until the applicant has graduated and has received a diploma from a reputable medical college, as the term "reputable medical college," is defined in Article 4501 of the Revised Civil Statutes of Texas of 1925, as amended by this Act. The Board may in its discretion admit to partial examination applicants who have successfully completed the work of the first two (2) years of the college course required of licentiates. The application for partial examination must be in writing, accompanied by an affidavit made by the dean, or registrar, of a reputable medical college within the meaning of the law, showing that the applicant has successfully completed the work of the first two (2) years of said course, and by a fee of Fifteen Dollars ($15). The Board may prescribe all other prerequisites of such applications. No license shall be granted to any applicant who has successfully passed such partial examination until all legal requirements for granting license have been complied with. All partial examinations must be conducted in the same

manner and under the same rules prescribed for complete, or full, examination. The fee for second, or final, examination shall be twenty-five ($25) dollars. Acts 1907, p. 224; Acts 1923, p. 288; Acts 1939, 46th Leg., p. 352, sec. 4.

Article 4504—Construction of this Law

Nothing in this Chapter shall be so construed so as to discriminate against any particular school or system of medical practice, nor to affect or limit in any way the application or use of the principles, tenets or teachings of any church in the ministration to the sick or suffering by prayer, without the use of any drug or material remedy, provided sanitary and quarantine laws and regulations are complied with; and provided further, that all those so ministering or offering to minister to the sick or suffering by prayer shall refrain from maintaining offices, except for the purpose of exercising the principles, tenets or teachings of the church of which they are bona fide members. The provisions of the Chapter do not apply to dentists, duly qualified and registered under the laws of this State, who confine their practice strictly to dentistry; nor to duly licensed optometrists, who confine their practice strictly to optometry as defined by Statute; nor to duly licensed chiropractors, who confine their practice strictly to chiropractic as defined by Statute; nor to nurses who practice nursing only; nor to duly licensed chiropodists, who confine their practice strictly to chiropody as defined by Statute; nor to masseurs in their particular sphere of labor; nor to commissioned or contract surgeons of the United States Army, Navy or Public Health and Marine Hospital Serv-

ice, in the performance of their duties, and not engaged in private practice; nor to legally qualified physicians of other states called in consultation, but who have no office in Texas, and appoint no place in this State for seeing, examining or treating patients. This law shall be so construed as to apply to persons other than registered pharmacists of this State, not pretending to be physicians who offer for sale on the streets or other public places contraceptives, prophylactics or remedies which they recommend for the cure of disease. Acts, 1907, p. 224; Acts 1923, p. 289; Acts 1939, 46th Leg., p. 352, sec. 5; Acts 1949, 51st Leg., p. 169, ch. 94, sec. 21(a).

Article 4509. Committees: Rules and Regulations; Subpoenas and Evidence; Injunction; Hearings.

The Texas State Board of Medical Examiners shall have the power to appoint committees from its own membership, and to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of medicine, and the enforcement of this Act. The duties of any such committees appointed from the Texas State Board of Medical Examiners membership shall be to consider such matters pertaining to the enforcement of this Act and the regulations promulgated in accordance therewith as shall be referred to such committees, and they shall make recommendations to the Texas State Board of Medical Examiners with respect thereto. The Texas State Board of Medical Examiners shall have the power, and may delegate the said power to any committee, to issue subpoenas, and sub-

poneas duces tecum to compel the attendance of witnesses, the production of books, records, and documents, to administer oaths and to take testimony concerning all matters within its jurisdiction. The Texas State Board of Medical Examiners shall not be bound by strict rules of evidence or procedure, in the conduct of its proceedings, but the determination shall be founded on sufficient legal evidence to sustain it. The Texas State Board of Medical Examiners shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this Act. Said action for an injunction shall be in addition to any other action, proceeding, or remedy authorized by law. The Texas State Board of Medical Examiners shall be represented by the Attorney General and or the County or District Attorneys of this state. Before entering any order cancelling or suspending a license to practice medicine, the Board shall hold a hearing in accordance with the procedure set out in Article 4506, REVISED CIVIL STATUTES of TEXAS, 1925, as amended by this Act. As amended Acts 1953, 53rd Leg., P. 1029, ch. 426, Sec. 9.

Article 4510. Who Regarded as Practicing Medicine.

Any person shall be regarded as practicing medicine within the meaning of the law:

(1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method or to effect cures thereof; (2) or who shall diagnose, treat or offer to

treat any disease or disorder, mental or physicial or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas, and Article 4504, Revised Civil Statutes of Texas as contained in this Act. As amended Acts, 1953, 53rd Leg., p. 1029, Ch. 426, Sec. 10.

Article 4511. Definitions

The terms, "physician," and "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practitioners," "practitioners of medicine," and "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons. Acts, 1907, p. 224.

APPENDIX III

Article XVI, Section 31, Texas Constitution, 1876.

Section 31. The Legislature may pass laws proscribing the qualifications of practitioners of medicine in this State, and to punish persons for mal-practice; but no preference shall ever be given by law to any schools of medicine.

APPENDIX IV

In the

CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY DIVISION NUMBER TWO

No. 570,960

STATE OF MISSOURI, *ex rel*, RICHARD K. PHELPS, Prosecuting Attorney in and for Jackson County, Missouri,

Plaintiff,

v.

WILLIAM SCOPEL,

Defendant.

This was an action in equity. It was commenced by the filing of a verified petition. A temporary restraining order was issued, and an order to show cause why a temporary injunction should not be granted pending the final hearing was entered of record.

By agreement of the parties the order to show cause and the final hearing were consolidated, the cause proceeded to full hearing and was submitted pending the filing of briefs. The briefs of the parties having been filed and having been carefully studied by the Court, the Court herewith states its findings of facts and conclusions of law.

Defendant submitted several questions, which it is unnecessary to restate at this time since they may be found filed in the case. Briefly, the Court finds the principal facts to be as follows:

1. Plaintiff failed to adduce any evidence showing defendant to be of bad moral character and unfit to practice the healing arts.

2. Plaintiff failed to adduce any evidence showing that defendant had harmed any member of the public by reason of his administrations.

Defendant offered in evidence his current license and certification to practice naturopathy acquired by recent examination of the Georgia State Board of Naturopathic Examiners as proof of his competence to practice the naturopathic system of healing.

The evidence was that a great number of the states of the United States and numerous foreign countries provide for the licensing of naturopathic physicians. This system of healing is defined in Webster's dictionary. It is recognized by Act of Congress. Practitioners of the system maintain professional societies and schools for the training of physicians and publish journals and treatises.

The naturopathic system of healing is a limited system. It is described as a non-surgical, drugless therapeutic. Its adherents utilize air, light, heat, water, manipulation and electricity as agents of the treatment of disease. They administer the organic products of nature as medicines. The fundamental concept appears to be largely nutritional,

i.e., that to build a healthful human body is to cure and resist disease. Accordingly, these practitioners place considerable emphasis upon the eating of natural foods in their natural states. The Court cannot hold that such a system as this is of itself inimical to the wealth and welfare of the people. This would appear to be especially true with the current emphasis upon stress and deprivation at the forefront of current medical thinking. "Beyond the Germ Theory," a New York Academy of Medicine Book, 1954, by Iago Galdston, M. D., Editor.

Defendant admitted that he had no license from the State Board of Medical Examiners of Missouri and that he treated various human bodily ailments. If this is an offense under the criminal law, it nevertheless cannot constitute the defendant a public nuisance per se. *Missouri Veterinary Medical Ass'n. v. Glisan* (Mo. App.) 230 S. W. 2d 169; *People*, ex rel v. *Universal Chiropractic Ass'n.*, et al., 302 Ill., 228, 134 N. E. 4; *Redmond* v. *State*, 152 Miss. 54; 118 So. 360; *State* v. *Maltby*, 108 Nebr. 578, 188 N. W. 175; *Dean* v. *State*, 151 Ga. 371, 106 S. E. 792.

Defendant admits that he did not submit himself to the State Board of Medical Examiners and that he did not do so because he did not seek to practice medicine and surgery but instead seeks to practice as a naturopath. A letter from the Executive Secretary of the State Board of Medical Examiners was introduced in evidence wherein it was conclusively stated that the Board took the position that it had no authority to license naturopaths and would not entertain an application for a license to practice naturopathy.

The position taken by the defendant has merit. If the State Board of Medical Examiners of Missouri had no authority to issue licenses to naturopaths, then they could not force defendant to qualify as a general physician and surgeon in order to practice the more limited system of healing. *People v. Love*, 131 N. E. 809, 298 Ill. 304.

No state has the authority to prohibit the practice of any limited system of healing in the absence of a showing of injury or a tendency to injure the public health, safety or morals. *State v. Biggs*, 133 N. C. 729, 46 S. E. 401; 41 Am. Jur. 135. What the Legislature cannot prohibit, certainly this Court cannot prohibit.

The plaintiff in this case is actually the State Board of Medical Examiners. Although the petition is brought in the name of the prosecuting attorney for Jackson County, Missouri, he participated in name only.

In this case, the plaintiff seeks to have this Court hold that the Medical Practice Act in the State of Missouri covers the practice of naturopathy and that defendant herein is in violation of that Act. Then, without further showing, the plaintiff seeks to have the Court hold that it is entitled to an injunction based solely upon the violation of the Statute, without a showing of harm to the public or any individual thereof.

It is very doubtful whether the Legislature ever intended to regulate the practice of naturopathy in this state, because of the unfairness and unreasonableness of requiring that naturopaths be examined by a medical board of examiners composed entirely of M. D.'s. Such acts have been

held unconstitutional and void. See *People* v. *Love*, 131 N. E. 809, 298 Ill. 304, *State* v. *Biggs*, supra, and *State* v. *Armstrong*, 38 Idaho 493, 255 P. 491. An enlightening discussion of this situatiton can be found in *State* v. *Biggs*, 46 S. E. 401. It is said by the Supreme Court of North Carolina (l.c. 403):

> "Those not M. D.'s contend that the allopathic system of practice is contrary to the discoveries of science and injurious to the public. Some M. D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M. D.'s themselves, through an examining committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers, whether allopath, homeopath, osteopath, or the defendant? The law says that the M. D.'s may examine and certify whether an applicant is competent to be one of their number, and no one can practice medicine and surgery without it; but they cannot decide for mankind that their own system of healing is now and ever shall be the only correct one, and that all others are to be repressed by the strong arm of the law. This act admits Christian Scientists to practice to cure diseases without such examination. By what process of reasoning can massage, baths, and the defendant be excluded? In the cure of bodies as in the cure of souls, 'orthodoxy is my doxy, heterodoxy is the other man's doxy,' as Bishop Warburton well says. This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children or others under his care, whereby they are injured, he is liable to punishment; but whether it was proper treatment or not is a matter of fact, to be settled by a jury of his peers, and not a matter of law, to be decided by a judge, nor prescribed beforehand by an act of the Legislature."

Again, the Court said (l.c. 404):

"* * * The effect would be to prohibit to those who wish it those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title M. D.'s or prohibiting the use of such remedies altogether, neither of which results the Legislature could have contemplated, and both of which are forbidden by the provisions of the Constitution above cited. * * *."

The opinion ends with the following language (l.c. 405):

"* * * All the law so far has done or can do is to require that those practicing on the sick with knife and drugs shall be examined and found competent by those 'of like faith and order.' Dr. Oliver Wendell Holmes, in an address before the Medical Society in Massachusetts, said: 'If the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes.' An eminent medical authority in this state has said that out of 24 serious cases of disease, 3 could not be cured by the best remedies, 3 others might be benefitted, and the rest would get well anyway. Stronger statements could be cited from the most eminent medical authorities the world has known. Medicine is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the Master, who was himself called the Good Physician, was told that other than his followers were casting out devils and curing diseases, he said, 'Forbid them not.'

"Upon the special verdict, the defendant should be adjudged not guilty. Reversed."

The record in this case utterly fails to show that the defendant practiced on the sick with knife or drugs, and further showed that when he gave any prescription to any patient, it was signed by a medical doctor, who officed with him. There have been many cases in the reports wherein it was sought to obtain monopolies in the practice and dispensing of medicine for the M. D.'s. It is a matter of common knowledge that they have fought the chiropractors, the osteopaths, the Christian Scientists, the naturopaths, and every cult who ever claimed that they could help or cure the sick. This was done in the State of Illinois, as shown by the reports in the case of *People* v. *Love*, supra, and *People*, ex rel *Shepardson*, et al. v. *Universal Chiropractors Ass'n.*, et al., 134 N. E. 4.

The plaintiff does not seek to prosecute the defendant for a violation of the criminal statute, if it covers him, which the Court doubts, but seeks, with one swipe of its M..D. broom to enjoin the defendant of curing or relieving ailments by natural means, on the theory that solely because the Statute is violated, the defendant is guilty of a public nuisance, and this without a showing of harm to any members of the public, or without any showing derogatory to the character of defendant.

This cannot be done. See *Missouri Veterinary Medical Ass'n.* v. *Glison*, 230 S. W. 2d, 169, wherein it was held that the unlicensed practice of veterinary surgery, dentistry and medicine is not a public nuisance which can be enjoined, notwithstanding that such practice is an offense

under the R. S. Mo. 1949, Secs. 340.030, and 340.140, (formerly R. S. Mo. 1939, Secs. 14234, 14230.)

In the case at bar, the plaintiff failed to show that defendant was unskilled in the performance of the practice in which he was engaged, or that any of those administered to by him were improperly treated, and the evidence boiled down to one showing, and that is that defendant operated without a license to practice medicine, which he could not obtain in the State of Missouri unless he passed an examination given by the State Board of Medical Examiners, which consists of six members, all of whom are by Statute required to be doctors of medicine, and none of whom have ever studied or graduated from a school of naturopathy. Therefore, the injunction is denied.

JOHN F. COOK, (Judge)

APPENDIX V

No. 8737

STATE OF IDAHO *ex rel.*, STATE BOARD OF MEDICINE of the State of Idaho, S. M. Poindexter, Chairman,
Plaintiff-Appellant,

v.

DAVID SMITH,
Defendant-Respondent.

Supreme Court of Idaho.

April 8, 1959.

Action by state to enjoin defendant from advertising himself as naturopathy doctor on ground that he was not licensed to engage in practice of medicine and surgery or other healing art. The District Court, Ada County, Doran H. Sutphen, J., sustained defendant's demurrer, and state appealed. The Supreme Court, Bellwood, J., held that complaint did not state facts sufficient to constitute cause of action.

Affirmed.

* * * * *

On February 21, 1955, appellant filed its Second Amended Complaint in which it is alleged, among other things:

"II

"That Defendant, David Smith, is a resident of Ada County, State of Idaho, and that he is not now, and

never has been, the holder of a license to practice medicine and surgery in the State of Idaho and is not now and never has been the holder of a license to practice any of the healing arts in the State of Idaho.

"III

"That Defendant presently advertises, in the manner alleged in Paragraph VI of this Second Amended Complaint, in Ada County, State of Idaho, as one being willing and able to investigate and diagnose both real and imagined mental and physical ailments of the human body, of the types commonly investigated and diagnosed by practicing naturopathic doctors in Idaho, with the view or relieving the same.

"IV

"That Defendant presently advertises in Ada County, State of Idaho, as one being willing and able to treat both real and imagined mental and physical ailments of the human body, with the view of relieving the same by methods commonly employed by practicing naturopathic doctors in Idaho.

"V

"That naturopathic doctors in Idaho, in treating real and imagined mental and physical ailments of the human body with the view of relieving the same, commonly employ physical culture and drugless treatment of disease (other than surgery) by all known methods supposed to stimulate or assist nature, as for example, by the use of light, air, water, heat, rest, diet, herbs and massage.

"VI

"That Defendant advertises himself as a practicing naturopathic doctor, as alleged in Paragraphs III, IV and V of this Second Amended Complaint, by main-

taining a sign on the door of a building located at 6102 Fairview Avenue near the northwesterly boundary of Boise City, Ada County, Idaho, said sign reading as follows:

"'David W. Smith, N.D.
Hours by Appointment
Entrance'

"and causing to be maintained in the current (Fall) edition of the Boise Telephone Directory of the Mountain States Telephone and Telegraph Company the following entries:

"'Smith David W. natrpthc phys
6112 Fairview av—4-3681'
(page 63 of the Directory)

and

"'Naturopathic physicians

* * * * *

Smith David W. 6112
Fairview av—4-3681'
(page 91 of the Directory)

"VII

"That Defendant threatens to continue to advertise in the manner set forth in Paragraphs III, IV, V and VI of this Second Amended Complaint.

"VIII

"That, unless restrained and enjoined from so doing, the continuation of the acts mentioned in Paragraphs III, IV, V, VI and VII of this Second Amended Complaint would endanger the public health, safety and welfare in Ada County, Idaho."

By the second amended complaint the appellant seeks (1) an adjudication that the acts of the respondent thus alleged constitute the practice of medicine and surgery or

the practice of one or more of the other healing arts for which the State of Idaho requires licenses, and (2) a permanent injunction restraining the respondent from advertising as thus alleged.

On February 25, 1955, respondent filed a two-part demurrer to the second amended complaint (1) that it does not state facts sufficient to constitute a cause of action against respondent, and (2) that it is ambiguous, unintelligible and uncertain in enumerated particulars; and a motion to strike therefrom paragraphs III, IV, V, VI, VII and VIII.

On June 11, 1957, the district court sustained "said demurrer" * * * "without leave to plaintiff (appellant) to amend" and granted the motion to strike as regards paragraphs III, IV, VI, VII and VIII. There followed the district court's judgment of dismissal of the second amended complaint and the action based thereon, from which this appeal is taken. Among other charges of error, appellant urges that the district court erred in sustaining the demurrer and not overruling the same.

Chapter 18, Title 54, I.C., regulates the practice of medicine and surgery. Section 54-1802, I.C., provides in pertinent part as follows:

> "(a) Any person shall be regarded as practicing medicine and surgery who shall advertise in any manner, or hold himself or herself out to the public, as a physician and surgeon, or either, or who shall investigate, diagnose or treat, or offer to investigate, diagnose or treat, any physicial or mental ailment or disease, real or imagined, of any person with a view

> to relieving the same, as is commonly done by physicians and surgeons, or suggest, recommend, prescribe or direct for the use of any person, sick, injured or deformed, any drug, medicine, means or appliance for the intended relief, palliation or cure of the same, or who shall suggest, recommend, prescribe or direct an operation on any such sick, injured or deformed person or who shall perform, or offer to perform, any such operation whether or not such person receives therefor, either directly or indirectly, any fee, gift or compensation of any kind whatsoever or in any manner whatsoever: Provided, however, that the definition of the practice of medicine and surgery as defined above shall not be construed to include the practice by any person of a healing art which is a system or mode of treating the sick or afflicted which is, or may hereafter be, licensed under the laws of this state if the person practicing such healing art holds a license from the state entitling him to engage in the practice of such healing art, including licensed pharmacists while engaged in the practice of their profession; and provided further, that the provisions of this act shall never be construed to affect in any manner the practice of the religious tenets of any church or religious belief. * * *"

Section 54-1803, I.C., makes it unlawful to practice medicine and surgery without a license, and Section 54-1815, I.C., authorizes injunctions to restrain violations.

Chapters 7 and 16 of Title 54, I.C., regulate chiropractic and osteopathy, respectively.

Naturopathy is not expressly regulated or licensed by the Idaho Code.

Appellant contends that the practice of medicine and surgery (Sec. 54-1802, supra) includes every aspect of each and every branch of the entire healing art except those

separately licensed; that insofar as the practice of chiropractic or osteopathy covers naturopathy, the latter, to the extent covered, can be practiced only by the holder of a license in the covering field of healing; that insofar as naturopathy is not thus covered by such practices, it is covered by the all-inclusive field of medicine and surgery, and thus, to that extent requires a license in medicine and surgery; and finally, that Chapter 18 of Title 54, I.C., as it thus regulates or relates to naturopathy, is a constitutional exercise of the police powers in its requirement that practicing naturopaths must hold a license in a healing art.

With appellant's contentions we cannot agree. Principles applicable here, and controlling, have appeared heretofore in this Court's decisions.

[1] The substance of the second amended complaint is that the respondent is holding himself out as a naturopathic doctor or physician and that he is threatening and advertising that he is engaging and will continue to engage in the practice of naturopathy. While it is primarily a legislative prerogative to determine what constitutes permissible practice of naturopathy or define what naturopathy is, it would not be amiss to examine the same. Webster's New International Dictionary, 2nd Ed., provides the following definitions:

Naturopathy:	(L. *natura*, nature + pathy) a system of physical culture and drugless treatment of disease by methods supposed to simulate or assist nature.
Pathy	: A system of treating disease.

The American Illustrated Medical Dictionary, 22nd Ed., provides the following definition:

> Naturopathy: A drugless system of therapy by the use of physical forces, such as air, light, water, heat, massage, etc.

The legislature, by Section 54-1802, supra, has defined the practice of medicine and surgery.

By Section 54-712, I.C., the legislature has defined the practice of chiropractic as follows:

> "Any licentiate under this chapter may adjust any displaced segment of the vertebral column or any displaced tissue of any kind or nature, for the purpose of removing occlusion of nerve stimulus in the bodies of human beings, and practice physiotherapy, electrotheraphy, hydrotheraphy, as taught in chiropractic schools and colleges, but nothing herein contained shall allow any licentiate to prescribe medicine, perform surgical operations or practice obstetrics."

While the legislature has provided regulatory measures for the practice of osteopathy, it has not defined the same. But in State v. Sawyer, 36 Idaho 814, 214 P. 222, among several definitions we find the following:

> "Osteopathy * * * is a system of treating diseases of the human body without drugs and by means of manipulation."

[2] From these definitions of the practices of medicine and surgery, chiropractic and osteopathy, it must be evident that the calling or profession of one differs materially from the calling or profession of the others; that the system of healing employed by the naturopath has little in common with that employed by the physician and surgeon, the chiro-

practor or the osteopath; and that while the physician and surgeon is authorized to treat the sick and afflicted by any and all methods and means, the naturopath, the chiropractor and the osteopath are limited in their treatments to their particular systems. Naturopathy may not be as generally known as the three branches of the healing art just referred to, but it has been and is recognized as a separate and distinct system of the healing art.

[3] No persuasive reason has been assigned, nor is one indicated for departing from the principles pronounced in State v. Armstrong, 38 Idaho 493, 225 P. 491, 33 A.L.R. 835, and State v. Fite, 29 Idaho 463, 159 P. 1183. Whether the question occupation be chiropody, as in the Armstrong case, or naturopathy, as in this case, the principles are equally applicable. The right to follow a recognized occupation is a right protected by the constitutional guarantees of liberty. Fourteenth Amendment to the Federal Constitution; Idaho Constitution, Art. 1, Sec. 13; Berry v. Summers, 76 Idaho 446, 283 P. 2d 1093.

[4-6] A calling may not be prohibited unless it is inherently injurious to the public health, safety or morals, or unless it has a tendency in that direction. State v. Armstrong, supra. Here the respondent is not in anywise holding himself in the capacity of a physician or surgeon, a chiropractor, or an osteopath; he holds himself out as a practitioner of the recognized branch of the healing art designated naturopathy. If the naturopath is limited in his practice to the use of a system of physical culture and drugless treatment by methods supposed to stimulate or

assist nature, or to the use of physical forces such as air, light, water, heat, massage, and other similar simple materia medica, the system cannot be inherently injurious or have a tendency in that direction. Nothing is indicated which would justify prohibiting naturopathy. And appellant disclaims any such intention on the part of the legislature. Naturopathy does bear some relation to the public health, and there can be no question but that the legislature has power to regulate all callings related to the public health. The contention is that naturopathy is regulated by Chapter 18 of Title 54, I.C., by requiring that a naturopath obtain one of the different sorts of licenses provided by law such as that for a physician and surgeon, a chiropractor, or an osteopath.

[7, 8] To require one desiring to engage in the practice of naturopathy to meet the requirements prescribed for physicians and surgeons would be an unreasonable regulation of a recognized calling, unnecessary for the public's protection. It would in most, if not all, instances amount to prohibition. So far as Section 54-1802, I.C., affects the practice of naturopathy, the act is unconstitutional and void. So far as it affects the branches of the healing art licensed by the statutes and all callings or practices sufficiently related to fall within them, it is valid.

[9] We adhere to and approve in this case the principles announced in the Armstrong and Fite cases above cited, and conclude that the respondent's demurrer was correctly sustained below. By virtue of the foregoing, it is unnecessary to consider the lower court's ruling on respondent's

motion to strike; even so, the ultimate result would remain unaffected.

The judgment of dismissal of appellant's second amended complaint is affirmed.

Costs to respondent, I.C. Sections 54-1809, 54-1815; Snake River Mutual Fire Insurance Co. v. Neill, Idaho, 336 P. 2d 107.

TAYLOR, SMITH, KNUDSON and McQUADE, JJ., concur.

PORTER, C. J., not participating.

FILE COPY

Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

CHARLES D. STUART, ET AL.,
Appellants,

v.

WILL WILSON, ATTORNEY GENERAL OF TEXAS,
and
TEXAS STATE BOARD OF MEDICAL EXAMINERS,
and
HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,
Appellees.

On Appeal From the United States District Court for the Northern District of Texas, Dallas Division

MOTION TO DISMISS OR AFFIRM

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Baldwin Printing Company, Inc., 209 West 9th Street, Austin, Texas

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MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Appellees, by counsel, and under Rule 16 of the Revised Rules of the Supreme Court of the United States, move that this honorable Court dismiss, with costs, the appeal taken to this Court by Appellants; or, in the alternative, to affirm the judgment below for the following reasons:

1. Title 28, U.S.C.A., Sec. 1253, does not confer jurisdiction on this court to hear this direct appeal from a single-judge District Court.

2. There is no substantial federal question presented in this action or appeal.

STATEMENT

This civil action in the United States District Court for the Northern District of Texas, Dallas Division, sought the convening of a three-judge District Court, a temporary restraining order, a temporary injunction, and, upon final hearing, a permanent injunction against Appellees from enforcing, as against Appellants, Articles 4495 through 4512, Revised Civil Statutes of Texas, (known as and referred to herein as the Texas Medical Practice Act; the significant sections of this Act are set out in Appendix II to the Appellants' Jurisdictional Statement, pages 37-46). However, a three-judge District Court was not convened as prayed for. The action was dismissed after a hearing by a single judge of the District Court for want of a substantial federal question. (The Order Dismissing Action is set out in Appendix Ib to the Appellants' Jurisdictional Statement, pages 35-36.) Appellants assert jurisdiction for this direct appeal under the provisions of Title 28, U.S.C.A. Sec. 1253. (see Appellants' Jurisdictional Statement, page 4.) Title 28, U.S.C.A., Sec. 1253 is set out in Appendix I hereto. No other basis for jurisdiction is claimed by appellants.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is set out in Appendix Ia of the Appellants' Jurisdictional Statement, pages 31-34.

ARGUMENT

Appellees question the jursidiction of this Court to hear this direct appeal insofar as such jurisdiction is purported to be conferred by Title 28, U.S.C.A., Section 1253. Although Appellants sought the convening of a three-judge District Court, such was not convened. The Order Dismissing Action was entered by a single judge. Such an order cannot be the basis for a direct appeal from a District Court to this Court under Title 28, U.S.C.A., Section 1253.

Stratton, Secretary of State of Illinois, v. St. Louis S.W. Railway Company, 282 U.S. 10, (1930) discusses this Court's jurisdiction as conferred by the predecesor sections to Section 1253, and says in part as follows:

> "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement."

The same reasoning applies to the present appeal insofar as it purports to be authorized by the terms of Title 28, U.S.C.A., Section 1253.

For the convenience of the Court, the opinion of the Court in the *Stratton* case, supra, is set out in full in Appendix No. II.

This appeal should be dismissed because Appellants have not brought themselves under any stated provision authorizing a direct appeal to this Court from a Dirtrict Court.

In the alternative, it is respectfully submitted that the Order Dismissing Action for want of a substantial federal question should be affirmed because the questions presented are so unsubstantial as not to warrant further argument.

Unless otherwise provided by law, all those who would treat or offer to treat the sick in Texas are regulated by the Texas Medical Practice Act regardless of the means or methods they would use. Anyone, including Appellants, who would so practice must meet the minimum standards deemed essential to protect the health and welfare of the citizens of Texas, as prescribed by the Legislature of the State of Texas. Insofar as Appellants are concerned, those minimum standards for the practice of the healing arts are incorporated in the Texas Medical Practice Act, Articles 4495 through 4512, Revised Civil Statutes of Texas. These standards are substantially unchanged from the time they were initially upheld by this court as being a proper exercise of the State's

power over this most important activity in *Collins v. Texas*, 223 U. S. 288 (1912). This court said, in part, as follows:

"...

"The State constitutionally may prescribe conditions to such practice considered by it to be necessary or useful to secure competence in those who follow it."

"...

"Therefore, we have discussed the case on the merits; perhaps more than it needed in view of the decisions cited and others that establish the right of the State to adopt a policy even upon medical matters concerning which there is a difference of opinion and dispute."

For the convenience of the Court the full opinion in the *Collins* case is set out in Appendix number III.

There is no special statute in Texas authorizing or regulating the practice of Naturopathy as a separate, distinct, or limited segment of the healing arts. In Texas, the practice of the healing arts by the principles of Naturopathy is considered to be the practice of medicine as that term is defined by State law. (See *Wilson v. State Board of Naturopathic Examiners*, Civ. App., 298 S.W.2d 946; Writ of Error Refused, no reversible error, Supreme Court of Texas; Certiorari denied 355 U.S. 870, rehearing denied 355 U.S. 920.)

Should anyone in Texas desire to treat or offer to treat sick, injured or afflicted human beings by

any system, including Naturopathy, that person must comply with the provisions of the Texas Medical Practice Act. (*Collins v. Texas*, supra). This act regulates the practice of medicine in Texas, not only by those who hold degrees as Doctors of Medicine, but also the practice by those who subscribe to other disciplines of treatment, such as those who are Doctors of Osteopathy, those who are Homeopathic Physicians, those who are Naturopathic Physician, and those who are Eclectic Physicians. If any of the Appellants legally establish their compliance with this basic standard of competence prescribed by the Legislature of Texas, they would be licensed and authorized to practice the healing arts, including those governed by the principles of Naturopathy, in Texas. There is no allegation, nor anything in the record of this cause tending to show, that any of the Appellants have complied with any of the requirements of the Texas Medical Practice Act, nor that they have even attempted to do so.

The Legislature of the State of Texas has made a reasonable and valid determination that the best interests of the citizens of Texas demand that persons who profess to have the ability to diagnose and treat human ills should have at least a basic competence. Appellants have failed to show how and in what manner that determination has deprived them of any rights properly cognizable here.

In essence, Appellants' compliant in this action is that the Legislature of Texas has not made an exception of their particular school of thought and has not granted to them the privilege to practice the

healing arts in Texas except in compliance with the Texas Medical Practice Act.

Appellees respectfully submit that Appellants seek this Court to make a policy decision for the people of the State of Texas, rather than to adjudicate a justifiable controversy.

CONCLUSION

Appellees respectfully submit that this appeal should be dismissed because of the lack of jurisdiction in this Court to hear this Direct Appeal; and, in the alternative, that the order dismissing action entered by the Court below be in all things affirmed.

Respectfully submitted,

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Attorney General of Texas

JOHN WILDENTHAL, JR.
Assistant Attorney General

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Assistant Attorney General
Capitol Station
Austin, Texas

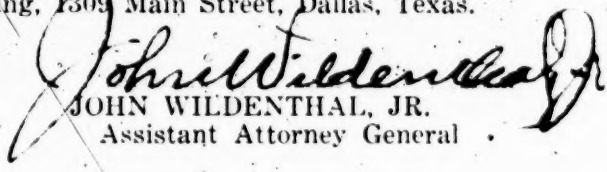
Attorneys for Appellees

* Attorney upon whom services may be had.

SERVICE

I, John Wildenthal, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of

the United States, and I do now enter my appearance in The Supreme Court of The United States in the above captioned case in behalf of the Appellees; and I do hereby certify that a copy of the foregoing motion has been forwarded by United States Mail, First Class, Postage Prepaid, to Appellants' Attorney, Mr. James L. McNees, Jr., 407 Davis Building, 1309 Main Street, Dallas, Texas.



JOHN WILDENTHAL, JR.
Assistant Attorney General

APPENDIX I

Title 28, U.S.C.A., Section 1253. DIRECT APPEAL FROM DECISIONS OF THREE-JUDGE COURTS.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

APPENDIX II

Stratton, Secretary of State of Illinois

v.

St. Louis Southwestern Railway Company
282 U. S. 10

In The United States Supreme Court

November 24, 1930

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought on July 21, 1927, by St. Louis Southwestern Railway Company to restrain the enforcement of a statute of the State of Illinois (General Corporation Act, § 107, providing for the payment of a minimum franchise tax, upon the ground that the statute as applied to the complainant violated the commerce clause, and the due process and equal protection clauses, of the Federal Constitution. The bill of complaint prayed for both a preliminary and a permanent injunction against the defendant, Secretary of State of Illinois, from instituting any proceedings to assess the tax or to enforce any of the prohibitions or penalties prescribed in case of refusal to pay.

On July 22, 1927, the complainant made a motion for a temporary restraining order in accordance with the prayer of the bill. On the same day, District Judge Fitzhenry entered an order enjoining the defendant from revoking the complainant's certificate of authority, from hindering the complainant in transacting its business in the State of Illinois, and from taking any steps for the enforcement of penalties, pending the determination of the application for an interlocutory injunction. While this order was in force, the defendant, on November 1, 1927, moved to dismiss the

bill for want of equity. This motion was heard and granted by District Judge Fitzhenry, sitting alone, and on June 7, 1928, he entered a decree dismissing the bill and dissolving the restraining order. 27 F. (2d) 1005.

On an appeal by the complainant from this decree, the Circuit Court of Appeals, holding the statute, which laid the tax, to be invalid under the Federal Constitution, reversed the decree and remanded the cause with directions to enter a decree in accordance with the views expressed in its opinion. 30 F. (2d) 322. A petition for a rehearing was denied, and from the decree of the Circuit Court of Appeals the present appeal is taken.

The question is thus necessarily presented, although not raised by the parties, with respect to the validity of the decree entered in the District Court, and the jurisdiction of the Circuit Court of Appeals to entertain the appeal from that decree, in the light of § 266 of the Judicial Code, as amended (U.S.C., Tit. 28, § 380). The statute provides that no interlocutory injunction, restraining the action of any officer of a State in the enforcement of a statute of the State, or of an order made by an administrative board or commission pursuant to a state statute, shall be granted by any Justice of the Supreme Court of the United States, or by any District Court, or by any Judge thereof, or by any Circuit Judge acting as District Judge, upon the ground of the unconstitutionality of the statute, unless the application for the injunction shall be heard and determined by three judges. When the application for such an injunction is presented to a justice or judge, he must immediately call to his assistance two other judges, as stated, but if he is of opinion that irreparable loss may otherwise result to the complainant, he may grant a temporary restraining order which is to remain in force only until the hearing and determination of the application for an interlocutory injunction upon prescribed notice. An appeal may be taken to this Court from the order granting or denying, after

notice and hearing, an interlocutory injunction in such case. By the amendment of February 13, 1925 (43 Stat. 938), the provisions with respect to the presence of three judges was made to apply also to the final hearing in such suit in the District Court, and from the final decree granting of denying a permanent injunction, a direct appeal lies to this Court.

The decisions of this Court require the following conclusions as to the purpose and effect of the statute.

First. By the statute in its original form, the Congress sought to make interference by interlocutory injunction with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the presence of a court composed of three judges, as provided by the statute, was likely to secure. *Cumberland Telephone & Telegraph Company v. Public Service Commission*, 260 U. S. 212,216. The gravity of this class of cases was recognized and it was sought to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction. *Chicago Great Western Railway Company v. Kendall*, 266 U. S. 94,97; *Moore v. Fidelity & Deposit Company*, 272 U. S. 317,321; *Ex Parte Collins*, 277 U. S. 565,567. These purposes were not altered by the amendment of the statute, which was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction. *Patterson v. Mobile Gas Company*, 271 U. S. 131,136; *Smith v. Wilson*, 273 U. S. 388, 390, 391.

Second. The statute applies only where there is a substantial claim of invalidity under the Federal Constitution and where an application for an interlocutory injunction, for the purposes contemplated by the statute, is made and pressed. *Ex parte Buder*, 271 U. S. 461, 463, 467; *Ex parte Hobbs*, 280 U. S. 168, 172. The complainant has

an election. If an interlocutory injunction is not sought, a single judge may hear and determine the case, and an appeal from the final decree will lie to the Circuit Court of Appeals. Judicial Code, section 128, U. S. C., Tit. 28, sec. 225; *Ex parte Buder, supra; Moore v. Fidelity & Deposit Company, supra; Smith v. Wilson, supra.*

Third. If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits, as he would be to grant either an interlocutory or a permanent injunction. His authority is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty immediately to call two other judges, as the statute directs, to assist him in hearing and determining that application. *Ex parte Northern Pacific Railway Company*, 280 U. S. 142, 144.

Fourth. If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an

appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court.

Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction. *Ex parte Metropolitan Water Company, 220 U. S. 539 Ex parte Northern Pacific Railway Company, supra.** This remedy would not be available if there were a remedy by appeal: *Ex parte Harding*, 219 U. S. 363; *Ex parte Metropolitan Water Company, supra; Ex parte Park Square Automobile Station*, 244 U. S. 412, 415; *Ex parte Slater*, 246 U. S. 128; *Ex parte Tiffany*, 252, U. S. 32, 37; *Ex parte Riddle*, 255 U. S. 450; *Maryland v. Soper* (No. 1), 270 U. S. 9.

Fifth. It follows that, in the present case, no appeal lay to the Circuit Court of Appeals, and that court should have dismissed the appeal for want of jurisdiction. The bill prayed for a preliminary, as well as for a permanent, injunction. On filing the bill the complainant at once moved for a temporary restraining order in accordance with the prayer of the bill. The order granted by the District Judge recited that the complainant sought a temorory restraining order pending a hearing on an application for an interlocutory or preliminary injunction, and the order enjoined the enforcement of a state statute until the consideration and determination of that application.

---

*The Act of October 22, 1913, c. 32, 38 Stat. 208, 220, U. S. C., Tit. 28, § 47, and section 266 of the Judicial Code, U. S. C., Tit, § 28, § 380, are in pari materia (Virginian Railway Co. v. United States, 272 U. S. 658, 671, 672), and this Court may also issue a writ of mandamus to the District Judge to require the performance of the statutory duty under the former Act. *Ex parte Atlantic Coast Line R. Co.*, 279 U. S. 822.

The Application to restrain the enforcement of the state statute pending the suit, was manifestly not withdrawn but was continuously pressed in order to avoid the prohibitions and penalties imposed by the state law in case the tax in question was not paid. The District Judge, on granting the temporary restraining order, failed to call in two other judges to aid him in hearing and determining the application for the interloctuory injunction, and the restraining order was permitted to operate as an interlocutory injunction for several months and until the determination of the motion to dismiss the bill on the merits.

The requirement of the statute has regard to substance and not to form. It matters not whether the injunction is called preliminary or interloctuory, or is styled a temporary restraining order, if it is granted to restrain the enforcement of state legislation and is continued in force until the hearing on the merits, without such restraint pending the suit being made the subject of consideration and determination by three judges as the statute requires. The temporary restraining order which the District Judge, acting alone, could grant is only to maintain the status quo, on proper cause being shown, for such time as may be necessary to obtain a decision upon the application for an interloctuory injunction by a court of three judges, which is to be immediately convened.

As the proceeding in this suit fell within the provision of the statute and the District Judge had no jurisdiction to hear the motion to dismiss the bill on the merits, the consent of the parties could not give validity to the decree or confer jurisdiction upon the Circuit Court of Appeals to entertain an appeal therefrom. *United States v. Emholt*, 105 U. S. 414, 416; *Parker v. Ormsby*, 141 U. S. 81, 86; *Perez v. Fernandez*, 202 U. S. 80 100; *443 Cans of Egg Products v. United States*, 226 U. S. 172, 184; *Exporters v. Butterworth-Judson Company*, 258 U. S. 365, 369.

The remedy by mandamus to vacate the decree and to require the District Judge to call to his assistance two other judges, as directed by the statute, to hear the application for an interloctuory injunction, is still available. It is not necessary, however, that formal application should be made for such a writ, as the District Judge may now proceed to take the action which the writ, if issued, would require.

When it appears, on an appeal to this Court from a decree of the Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action of this Court is to reverse the decree of the Circuit Court of Appeals and to remand the case with directions to dismiss the appeal to that court for want of jurisdiction. *Union & Planter's Bank v. Memphis*, 189 U. S. 71, 73-74; *443 Cans of Egg Products v. United States, supra; Carolina Glass Company v. South Carolina*, 240 U. S. 305, 318; *City of New York v. Consolidated Gas Company*, 253 U. S. 219, 221; *The Carlo Poma*, 255 U. S. 219, 221.

Decree reversed and cause remanded to the Circuit Court of Appeals with directions to dismiss the appeal to that Court for want of jurisdiction.

APPENDIX III

COLLINS V. THE STATE OF TEXAS
223 U. S. 288

Error in the Court of Criminal Appeals of the State of Texas.

No. 165. Argued January 25,26, 1912.—Decided February 19, 1912.

This is a writ of error to the Texas Court of Criminal Appeals upon a judgment denying the plaintiff in error a release by habeas corpus. The plaintiff in error is held upon an information charging him with practising medicine for money by treating a named patient for hay fever by osteopathy, without having registered his authority as required by a Texas statute of April 17, 1907, c. 123 (Gen. Laws, 1907, p. 224). He denies the constitutionality of the act.

The statute establishes a Board of Medical Examiners and requires "all legal practitioners of medicine in this State, who, practising under the provisions of previous laws, or under diplomas of reputable and legal college of medicine, have not already received license from a State Medical Examining Board of this State" to prove their diplomas, or existing license, or exemption existing under any law; whereupon they are to receive a verification license. §6. By § 7 applicants not licensed under § 6 must pass an examination, conditioned among other things on their being graduates of "bona fide reputable medical schools;" schools to be considered reputable "whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each."

By § 9 the examinations are to be fair to every school of medicine, are to be conducted on the scientific branches

of medicine only, and are to include anatmoy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence. Those who pass are to be granted licenses to practise medicine. By § 10 nothing in the act is to be construed to discriminate against any particular system, and the act is not to apply to dentists legally registered and confining themselves to dentistry, nurses who practise only nursing, masseurs, or surgeons of the United States Army, Navy, &c., in the performance of their duties.

The only other material sections of the act are §§ 13 and 14, the former of which declares that "any person shall be regarded as practising medicine within the meaning of this act: . . . (2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method to effect cures thereof and charge therefor, directly or indirectly, money or other compensation." By § 14 any person practising medicine in violation of the act is punished by fine and imprisonment, and is not to recover anything for the services rendered.

The facts charged against the plaintiff in error are admitted. It also is admitted that before the passage of the statute he had spent $5,000 in fitting up his place, and was deriving a net income from his calling of at least the same sum. He held a diploma from the chartered American School of Osteopathy, Kirksville, Missouri, after a full two years' course of study there, but it does not appear that he presented this diploma to the Board of Medical Examiners or attempted to secure either a verification license or license in any form. The Board in passing upon qualifications does not examine in therapeutics or materia medica, which, it will be observed, are not mentioned in the act. On these facts we are of opinion that the plaintiff in error fails to show that the statute inflicts any wrong upon him contrary to the Fourteenth Amendment of the Constitution

of the United States. If he has not suffered we are not called upon to speculate upon other cases, or to decide whether the followers of Christian Science or other people might in some event have cause to complain.

We are far from agreeing with the plaintiff in error that the definition of practising medicine in §13 is arbitrary or irrational, but it would be immaterial if it were, as its only object is to explain who fall within the purview of the act. That it does, and of course we follow the Texas court in its decision that the plaintiff in error is included. It is true that he does not administer drugs, but he practises what at least purports to be the healing art. The State constitutionally may prescribe conditions to such practice considered by it to be necessary or useful to secure competence in those who follow it. We should presume, until the Texas courts say otherwise, that the reference in § 4 to the diploma of a reputable and legal college of medicine, and the confining in § 7 of examinations to graduates of reputable medical schools, use the words medicine and medical with the same broad sense as § 13, and that the diploma of the plaintiff in error would not be rejected merely because it came from a school of osteopathy. In short, the statute says that if you want to do what it calls practising medicine you must have gone to a reputable school in that kind of practice. Whatever may be the osteopathic dislike of medicines, neither the school nor the plaintiff in error suffers a constitutional wrong if his place of tuition is called a medical school by the act for the purpose of showing that it satisfies the statutory requirements. He cannot say that it would not have been regarded as doing so, because he has not tried. *Dent v. West Virginia*, 129 U. S. 114, 124.

An osteopath professes, the plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centres. It is intelligible therefore that the State may require for a scientific

training. *Dent v. West Virginia*, 129 U. S. 114; *Watson v. Maryland*, 218 U. S. 173. He like others must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science, which the State requires him to prove. The same considerations that justify including him justify excluding the lower grades from the law. *Watson v. Maryland*, 218 U. S. 173, 179, 180. Again, it is not an answer to say that the plaintiff in error is prosecuted for a single case. If the legislature may prohibit a general practice for money except on the condition stated, it may attach the same conditions to a single transaction of a kind not likely to occur otherwise than as an instance of general practice. A distinction between gratuitous and paid for services was made in the Maryland statute sustained in *Watson v. Maryland*, 218 U. S. 173, 178. Finally, the law is not made invalid as against the plaintiff in error by the fact that he had an established business when the law was passed. *Dent v. West Virginia*, 129 U. S. 114, *Reetz v. Michigan*, 188 U. S. 505, 510.

The objections that prevailed against a writ of error like this in *Bailey v. Alabama*, 211 U. S. 452, do not exist here. There as here it was attempted to interrupt the ordinary course of a trial by habeas corpus, and there as here the State allowed the attempt and discharged the writ on the merits. But in that case it did not appear that the constitutional question relied upon had arisen or necessarily would arise, although afterwards it did. 219 U. S. 219. But here the facts are admitted, the question appears as plainly as it ever will, and is supposed to go to the jurisdiction of the court. Therefore we have discussed the case on the merits; perhaps more than it needed in view of the decisions cited and others that establish the right of the State to adopt a policy even upon medical

matters concerning which there is a difference of opinion and dispute. *Hawker v. New York*, 170 U. S. 189; *Meffert v. Packer*, 195 U. S. 625; *Jacobson v. Massachusetts*, 197 U. S. 11. See also *Williams v. Arkansas*, 217 U. S. 79. Judgment affirmed.

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Supreme Court, U.S.
FILED
FEB 15 1960
JAMES R. BROWNING, Clerk

No. 495

In the

Supreme Court of the United States

OCTOBER TERM, 1959

CHARLES D. STUART, *et al.*,

Appellants,

v.

WILL WILSON, ATTORNEY GENERAL OF TEXAS,

and

TEXAS STATE BOARD OF MEDICAL EXAMINERS,

and

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,

Appellees.

On Appeal From the United States District Court for the Northern District of Texas, Dallas Division

APPELLANTS' PETITION FOR REHEARING

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APPELLANTS' PETITION FOR REHEARING

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

Respectfully presented herewith by the Appellants is their Petition for Rehearing of the Decision rendered by

this Court on January 11, 1960 and to set aside said judgment and that this Court enter an appropriate order noting probable jurisdiction and that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, and for any other just order; and the grounds for this Petition briefly and distinctly stated are as follows:

1. UNDER RULE 16 THIS COURT SHOULD NOT DISMISS A DIRECT APPEAL FROM A FEDERAL COURT FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

A. These Appellants respectfully submit to this Court that under Rule 16 of the Supreme Court that this Court will receive under Paragraph 1 (a) of such rule "a motion to *dismiss* any appeal on the ground that the appeal is not within the jurisdiction of this Court, *because not taken in conformity to statute or to these rules.*" The decision entered in this case does not dismiss this case because the appeal was not taken in conformity to statute or to the Supreme Court rules. This case was appealed originally to the Court of Appeals for the Fifth Circuit, and pending that appeal, an appeal was perfected directly to this Court because of the following reasons.

In the opinion of the Appellants, it was felt that this case is one which should be decided by a three-judge court, and the case is brought as a case to be heard by a three-judge court because of the alleged unconstitutionality of the Texas Medical Practice Act (Appendix II, Jurisdictional Statement) insofar as it affects the practice of

naturopathy and the seeking by Appellants of an interlocutory and permanent injunction restraining the enforcement, operation and execution of said state statute by the officers of the State of Texas. Such proceeding falls squarely within Section 2281 of Title 28, U. S. C. A. which provides as follows:

> "2281. INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE; THREE-JUDGE COURT REQUIRED
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

In connection with such proceeding insofar as an appeal is concerned is *Section 1253 of Title 28, U. S. C. A.*, which provides as follows:

> "1253. DIRECT APPEAL FROM DECISIONS OF THREE-JUDGE COURTS.
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

Appellants might also mention at this point on the matter of jurisdiction, that the case is also brought under the provisions of *Section 1983 of Title 42, U. S. C. A.*, which provides as follows:

> "1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS
>
> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."

And further, Appellants point out in connection with the aforesaid civil rights part of their cause of action that such case is reviewable by the Court of Appeals and finally by this Court under the provisions of *Title 42, Section 1984*, which provides:

> "Section 1984. SAME; REVIEW OF PROCEEDINGS
>
> "All cases arising under the provisions of this Act (Civil Rights Act) in the Courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy under the same provisions and regulations as are provided by law for the review of other causes in said Court. Mar. 1, 1875, c. 114, sec. 5, 18 Stat. 337."

Thus this Honorable Court can see that the Federal Court has original jurisdiction of this cause as a Civil action for deprivation of their Constitutional rights; and in connection with this, the Court has to determine if this

Constitutional right has been deprivated, and to do this, the Court has to determine if the Texas Medical Practice Act, supra, is unconstitutional insofar as the Appellants are concerned. Thus, it appears to Appellants that by Federal Statute this is a case to be determined and decided by the Federal Courts.

Therefore, this Honorable Court can see why Appellants were in a quandary as to which Court to appeal to, and it was finally decided to appeal to both the Supreme Court, as well as the Court of Appeals in the event the proper appeal was direct to the Supreme Court. If the second appeal was not made, it was considered that the rights of appeal might be lost.

The Appellants may have been in error in doing this, because this case has never been actually decided by a Three-Judge Court; and as argued by counsel for Appellees, in their Motion to Dismiss, this appeal is subject to dismissal for want of jurisdiction, because only a single district judge decided this case. See *Stratton, Secretary of State of Illinois v. Louis S. W. Railway Company, 282 U. S. 10 (1930).*

The only reason the Appellants perfected an appeal to this Court was to preserve their right of appeal here in the event their appeal to the Court of Appeals in New Orleans was in error. The Appellants would like to point out here that the Appellees did not move the Court to *dismiss* the Appeal *for want of a substantial federal question.*

Inasmuch as this case was not heard by a Three-Judge Court, it might be proper that this case be dismissed for want of jurisdiction, because a Three-Judge Court has not rendered a judgment in this case, *Stratton* case, supra, and let the Court of Appeals render a decision in this case; or this Court should set aside its decision rendered on January 11, 1960, and await the outcome of the case in the Court of Appeals (the style of the case is the same, and it is No. 18,031 in that Court) before proceeding further herein, inasmuch as this is an extremely vital case and needs every attention this Court can give it.

B. Under Paragraph 1 (b) of said Rule 16, "the Court will receive a motion to *dismiss* an appeal from a *state court* on the ground that it does not present a substantial federal question; * * *"; but *this case is not on appeal from a state court*, and therefore, this part of the rule does not apply to this case whereby this appeal can be dismissed for want of a substantial federal question.

C. It is admitted that under Paragraph 1 (c) of said Rule 16 that this Court "will receive a motion to *affirm* the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." Therefore, it appears to these Appellants that if the Appellees motion were granted in this case that this Court could only enter an order *affirming* the judgment of the trial court, if this Court's decision is to dispose of this case preemptorily on the basis of Appellee's motion to affirm without a full hearing on the merits. But before this

Honorable Court takes any action toward affirming the District Court's decision, please let the Appellants discuss briefly the only points made by the Appellee's in their motion to affirm, and let these Appellants show to this Honorable Court the errors and fallacy of the Appellee's motion.

The Appellees contend on Page 4 of their motion, that the minimum standards for the practice of the healing arts are incorporated in the Texas Medical Practice Act, Articles 4495 through 4512, Revised Civil Statutes of Texas. These are the very articles that Appellants complain of. Appellants would like to point out to the Court that these articles *are not* the articles of Texas Statutes prescribing the Basic Minimum Uniform Standards for the practice of the healing arts in Texas. Appellants would like to point out to this Court, and Appellants strongly urge the Court to pay particular attention to this point: *The basic minimum uniform standards for a practitioner to practice the healing arts or any branch thereof in Texas is the statute known as the Basic Science Law. This is Article 4590c, Vernon's Annotated Revised Civil Statutes of the State of Texas, 1925, as amended to date.* Please allow Appellants to quote from this article:

"Article 4590c. BASIC SCIENCE LAW

"*Basic Science Certificate Required*

"Section 1. No person shall be permitted to take an examination for a license to practice the healing art or any branch thereof, or be granted any such license, unless he has presented to the Board or officer impowered to issue such a license as the applicant seeks, a certificate of proficiency in anatomy, physiology,

chemistry, bacteriology, pathology, and hygiene and public health, hereinafter referred to as the basic sciences, issued by the State Board of Examiners in the Basic Sciences.

"The Healing Art Defined

"Section 2. For the purpose of this Act, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition. * * *"

The foregoing Article goes on to provide for the Board of Examiners; Organization, Officers and Compensation of Board; Fees Payable by Applicants; Examination; Requirements for Certificate; Reciprosity; Appeal; Certificates and Licenses Void; Practice Without Certificate Forbidden; Fraudulent Certificate Forbidden; Bribery Forbidden; Fraudulent License Forbidden; Enforcement; Exceptions; Certificates Issued to Persons Having College or University Credits, Graduates Enrolled Before Act Became Law; Saving Clause; and Present Licensure Acts Not Repealed.

Thus, this Honorable Court can easily see that the standard minimum uniform requirements to practice the healing art or any branch thereof including naturopathy is specifically provided for in the aforesaid Basic Science Law. The Appellees would have this Court to believe otherwise.

The Appellants would further like to take this opportunity to point out to the Court that the Texas Legislature

has provided several statutes setting forth the requirements, etc., for the issuance of licenses to practice the healing art and its branches. These, by article number *(Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, as amended to date)* are as follows:

Medicine	Articles 4495-4512
Chiropractors	Article 4512b
Nurses	Articles 4513-4528b
Licensed Vocational Nurse	Article 4528c
Pharmacy	Article 4542a & b
Dentistry	Articles 4543-4551d
Dental Hygienists	Article 4551e
Optometry	Articles 4552-4566-1
Chiropody	Articles 4567-4575
Naturopathy	Article 4590d

Further, for the benefit of this Honorable Court, Appellants would like to point out the fact that the Legislature of Texas has recognized the differences and distinction between the healing art and its different branches, and has carefully identified them. At this time please permit the Appellants to quote three sections from the Healing Art Identification Act, *Article 4590e (Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, as amended to date)*:

"Art. 4590e. HEALING ART IDENTIFICATION ACT

"Title

"Section 1. This Act shall be known as the Healing Art Identification Act. The provisions of this Act shall not affect or limit in any way the application or use of the principles, tenets, or teachings of any established church in the ministration to the sick or

suffering by prayer, without the use of any drug or material remedy, provided sanitary and quarantine laws and regulations are complied with; and provided, further, that all those so ministering or offering to minister to the sick or suffering by prayer shall refrain from maintaining offices, except for the purpose of exercising the principles, tenets, or teachings of the church of which they are bona fide members

"The Healing Art Defined

"Sec. 2 For the purpose of this Art, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition.

"Healing Art Identifications

"Sec. 3 Every person licensed to practice the healing art heretofore or hereafter by either the Texas State Board of Medical Examiners, the State Board of Dental Examiners, the Texas Board of Chiropractic Examiners, the Texas State Board of Examiners in Optometry, the State Board of Chiropody Examiners and the State Board of Naturopathic Examiners shall in the professional use of his name on any sign, pamphlet, stationery, letterhead, signature, or on any other such means of professional identification, written or printed, designate in the manner set forth in this Act the system of the healing art which is by his license permitted to practice. The following are the legally required identifications, one of which must be used by practitioners of the healing art:

"(1) If licensed by the Texas State Board of Medical Examiners on the basis of the degree Doctor of Medicine: physician and or surgeon, M. D.; doctor, M. D.; doctor of medicine, M. D.

"(2) If licensed by the Texas State Board of Medical Examiners on the basis of the degree Doctor of

Osteopathy: physician and/or surgeon, D. O.; Osteopathic physician and/or Surgeon; doctor, D. O.; doctor of osteopath; osteopath; D. O.

"(3) If licensed by the State Board of Dental Examiners: dentist; doctor, D. D. S.; doctor of dental surgery; D. D. S. doctor of dental medicine, D. M. D.

"(4) If licensed by the Texas Board of Chiropractic Examiners: chiropractor; doctor, D. C.; doctor of Chiropractic; D. C.

"(5) If licensed by the Texas State Board of Examiners in Optometry: optometrist; doctor, optometrist; doctor of optometry; O. D.

"(6) If licensed by the State Board of Chiropody Examiners: chiropodist; doctor, D. S. C.; doctor of surgical chiropody; D. S. C.

"(7) If licensed by the State Board of Naturopathic Examiners: naturopathic physician; physician, N. D.; doctor of naturopathy; N. D.; doctor, N. D."

Therefore, this Honorable Court can easily see that there are various standards, qualifications and identities for the various fields of the healing arts and its branches which are separate and apart from the basic minimum uniform standard requirements set forth for all the practitioners of the healing art and branches thereof. In other words, different standards and qualifications are recognized and apply to different fields of the healing arts and its branches; that is, certain requirements apply to one field that would not apply to others, and vice-versa. Actually the Naturopathy Act, Article 4590d above, required a greater number of hours of college preparation than the regular doctor (M. D.) or Allopathic Act (Texas Medical Practice Act, supra). In the opinion of the Appellants, the fact that

Texas now has the basic minimum uniform standards law (Basic Science Law) for all who are going to practice the healing art, or any branch thereof, destroys any effect whatsoever of the holding in the *Collins v. Texas* case, *223 U. S. 288 (1912)*, cited by Appellees in support of their proposition. Therefore, Appellants submit to this Honorable Court that the Texas Medical Practice Act does not provide the minimum standards for all practitioners of the healing arts or any branch thereof. But, even if it did, it would be violative of Appellants' Constitutional rights as discussed in Paragraph 2 below.

For a moment Appellants would like to discuss briefly the other case cited by Appellees in support of their Motion to Affirm. They cite *Wilson v. State Board of Naturopathic Examiners, Civic App., 298 S. W. 2d 946, Writ of error refused, no reversible error, Supreme Court of Texas; Certiorari denied, 355 V. S. 870, rehearing denied, 355 V. S. 920.* This case does not bring up the question of the unconstitutionality of the Texas Medical Practice Act, supra, insofar as the Constitution of the United States and the Fourteenth Amendment are concerned, nor were the Federal Civil Rights Act involved; and therefore is not definitive of the issues in the case before this bar. But, since Appellees have cited it, Appellants would like to mention it. In the opinion of the Appellants, that case erroneously declared the Naturopathic Act (Art. 4590d) unconstitutional insofar as the Texas Constitution is concerned. That case admits that the practice of naturopathy is limited to certain means and excludes specific means (pp. 947, 948); it also states that the differences between

the requirements of the regular Medical Practice (allopathic) Act and those of the Naturopathic Act are apparent and substantial (p. 950). Yet it says that naturopaths must take the same examination as the regular medical doctor (allopathics). Is this holding a preference in favor of the regular medical doctor or allopathic? The Appellants would say that it is. Such holding discriminates against the naturopath, and makes a preference in favor of the allopaths, all of which is actually contrary to the provisions of the Texas Constitution (Article XVI, Section 31) which prescribes that "No preference shall ever be given by law to any school of medicine", and likewise such requirement is violative of the XIV Amendment to the Constitution of the United States as discussed in paragraph 2 below. Therefore, in the opinion of the Appellants the Texas Naturopathic Act is actually constitutional rather than unconstitutional. The other point made in the *Wilson* case, supra, was that the Texas Naturopathic Act is invalid, because it is vague (Art. 6, V. A. C. P., Texas Constitution, Act 1, Sec. 10). Appellants submit that that Court erroneously reached this conclusion because it said that the practice of medicine as defined by *Art. 4510, (Texas Medical Practice Act)* would include the practice of naturopathy, and that the definition of naturopathy in the Naturopathic Act is the same as the practice of medicine, but limited to certain means and excluding certain means, and because the Texas Naturopathic Act affirmatively authorized a limited practice of medicine it also affirmatively denies that the statutes shall have such effect, and that in their opinion the Naturopathic Act

attempts to both grant and deny to them complying with its terms the privilege of practicing medicine as this term is defined by the statutes of the State of Texas, and that therefore the Naturopathic Statute is impossible of interpretation and enforcement and wholly void. Apparently the Court didn't earnestly endeavor to understand the Naturopathic Act, because it is just as clear as day, and actually the Naturopathic Act was passed after the Texas Medical Practice Act (Allopathic Act), and it prescribed for a limited branch of the healing art, and under all rules of statutory construction it is held that a subsequent limiting and definative statute prevails over a prior general statute. But, actually there is no conflict. The Texas Naturopathic Act *(Art. 4590d, see p. 947, Wilson case, supra)* provides as follows:

> "For the purpose of this Act naturopathy and natureopathy shall be construed as synonymous terms, and the practice of naturopathy or natureopathy, is hereby defined as that philosophy and system of the healing art embracing prevention, diagnosis, and treatment of human ills and functions by the use of several properties of air, light, heat, cold, water, manipulation with the use of such substances, nutritional as are naturally found in and required by the body, excluding drugs, surgery, X-ray and radium therapy, and the use of X-ray equipment.
>
> "Nothing in this Act shall be construed to be authority for any naturopath, licensed hereunder, to practice medicine as defined by the laws regulating the practice of medicine in this State, surgery, dentistry, osteopathy, chiropractic, Christian science, or any other treatment or system of treatment author-

ized for by law, nor shall the provisions of this Act in any way or manner apply to or affect the practice of medicine, surgery, osteopathy, Christian science, or any other treatment or system of treatment authorized and provided for by law for the prevention of human ills." (Sec. 18.)

What is the conflict between this Act and the Texas Medical Practice Act, *Art. 4510, V. A. C. A.* (See p. 947, *Wilson* case, supra, also appendix II, pages 45 and 46 of Jurisdictional Statement) which provides:

"Article 4510. Who Regarded as Practicing Medicine. Any person shall be regarded as practicing medicine within the meaning of the law:

"(1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method or to effect cures thereof; (2) or who shall diagnose, treat or offer to treat any disease or disorder, mental or physical or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas, and Article 4504, Revised Civil Statutes of Texas, as contained in this Act. As amended Acts, 1953, 53rd leg., p. 1029, Ch. 426, Sec. 10."

The Naturopathic Act simply provides that the naturopath cannot practice medicine as defined by the laws regarding the general practice of medicine in the State of Texas, which simply means that he cannot treat or cure patients by *any* system or method, but on the contrary he

is *limited* to treat and cure patients by certain limited means and he cannot use certain specific means, all as categorically set forth in the Naturopathic Act, supra. Appellants might add further, that even if there were doubt as to the unconstitutionality of any particular portion in the Act, such statement does not affect the Act itself, because of the final proviso therein, to-wit:

"Partial Invalidity

"Sec. 19. If any Section, paragraph, sentence or phase of this Act shall be declared unconstitutional or void for any reason by any court of final jurisdiction, such fact shall not in any way or manner, invalidate, or affect any other Section, paragraph, sentence, or phrase, of this Act, but the same shall remain in full force and effect. Acts 1949, 51st Leg., p. 890, ch. 480."

In addition to the foregoing statements, Appellants would desire to make further comment on the issue of a substantial federal question being involved in this case.

These Appellants hereby petition and beg this Court to not terminate this appeal at this point on the basis that there is not a substantial federal question involved, because of the reasons hereinafter set forth in the following paragraph.

2. THE FEDERAL QUESTIONS IN THIS CASE ARE SUBSTANTIAL, FUNDAMENTAL, GRAVE, AND NATIONWIDE AND DESERVE AND NEED PLENARY CONSIDERATION BY THIS COURT.

As set forth in the Jurisdictional Statement, the practice of naturopathy is a recognized, limited healing art and such occupation is succinctly defined in the Dictionary of

Occupational Titles, U. S. Department of Labor (this definition is set forth in full on page 16 of the Jurisdictional Statement). I also assume that this Court is fully aware of the laws of the District of Columbia *(Healing Arts Practice Act, D. C. 1928, 45 Stat. 1329, 1951 Code, the C. T. 2)* which recognizes Naturopathy as a separate and limited branch of the healing art and prescribes a special board and examination for the naturopathic practitioners. The main contention made by the Appellants in this case is that the *Texas Medical Practice Act, Articles 4495-4512, Texas Revised Civil Statutes, 1925*, as amended to date (See Appendix II to the Jurisdictional Statement) is an act prescribing the qualifications for and authorizing the issuance of a license to *allopathic* practitioners. It appears that many people before whom this question has been presented do not have a complete understanding as to the difference between an *allopathic practitioner* and a *naturopathic* practitioner. The Allopathic practice is the ordinary method of practicing medicine, adopted by the great body of learned and eminent physicians, which is taught in their institutions, established by their highest authorities, and accepted by the larger and more respectable portion of the community; but whether a physician practices such method or not cannot be proved by general reputation as a physician. *Words and Phrases, Permanent Edition, Vol. 3, Page 338, Bradbury v. Bardin, 34 Conn. 452, 453.* Allopathy is a term devised to name the usual or standard practice, to distinguish it from homeopathy. The Executives Desk Book, including The Winston Dictionary, The John C. Winston Company, Copyright 1957 by the John C.

Winston Company. Allopathy is the current or orthodox medical practice, distinguished from homeopathy. Chambers Twentieth Century Dictionary, The New Mid-Century Version, edited by William Geddie, M. A. B. Sc. W & R Chambers, Ltd., Thistle Street, Edinburg, 6 Dean Street, London W. 1. Twelve years went into the making the new Mid-Century version of a dictionary that has long been quoted as an authority in courts of law.) Thus an *Allopath* is today's general medical doctor or surgeon, who treats disease by *any* system or method, while a *naturopath* is limited to the system of treatment which is encompassed within the definition of a naturopathic doctor which the Court will find on Page 16 of the Jurisdictional Statement. The Court will note that the Texas Medical Practice Act, Article 4510 (See pages 45 and 46 of the Jurisdictional Statement) is a law pertaining to the *allopaths* who treat disease and disorders by *any* system or method; and the Court will further note that to practice allopathy in the State of Texas under said Texas Medical Practice Act that the applicant for a license under said Act has to be examined on general medical subjects and surgery which are practiced by the allopaths or regular M. D. doctors as prescribed in Article 4503 of said Act (See page 41 of the Jurisdictional Statement). The naturopaths, according to their tenets and teachings, and the philosophy of their limited branch of the healing art, do not practice the general field of medicine and surgery, but rather use the natural means of treatment by determining the cause of a patient's discomfort or illness or disease and removing such cause by natural restorative means to return the

human body back to its normal balance and functions, thus eliminating the discomfort, illness or disease in the patient. The naturopath does not study nor use surgery, toxic drugs, or x-ray for therapeutic purposes, and actually he does not champion the use of such methods to restore a person to good health; and some of the methods of treatment utilized by an M. D. are actually repugnant to and contrary to the tenets, teachings, philosophies and methods of treatment used by the naturopaths, and many times the naturopath has to step in and restore a human body to good health by natural treatment after an M. D. has exhausted all his remedies to cure a patient. It is, therefore, fundamental that to require one desiring to engage in the practice of naturopathy to meet the requirements prescribed for general physicians and surgeons would be an unreasonable regulation of a recognized calling, unnecessary for the public's protection. It would in most, if not all, instances amount to prohibition; and this right to follow a recognized occupation is a right protected by the constitutional guarantees of liberty as set forth in the Fourteenth Amendment to the Constitution of the United States; and, therefore, these Appellants fervently appeal to the Court to hold that insofar as the Texas Medical Practice Act, supra, affects the practice of naturopathy, the act is unconstitutional and void; and that so far as said act affects allopathy or the general practice of medicine and surgery it is valid. See *State of Idaho ex rel; State Board of Medicine of the State of Idaho, S. M. Poindexter v. David Smith (Supreme Court of Idaho, April 8, 1959), 337 Pacific 2d 938-942.*

These Appellants further appeal to this Court to recognize their constitutional rights and respectfully urge this Court to review the holding of this Court and the Court of Appeals for the Fifth Circuit in the case of *England et al. v. Louisiana State Board of Medical Examiners et al. (Fifth Circuit-September 9, 1958), 259 F. 2nd 626, (Fifth Circuit on rehearing-January 23, 1959) 263 F. 2nd 661 (Supreme Court-June 1, 1959) 359 U. S. 1012, 3 L. Ed. 2nd 1036, 79 S. Ct. 1149.* In this latter case this Honorable Court holds that the state may *regulate, within reasonable bounds*, a recognized useful, *limited* system of the healing art, but it cannot prescribe such arbitrary and unreasonable requirements which will contravene the constitution and laws of the United States and amount to a denial of due process of equal protection of the laws under the Fourteenth Amendment. This latter case is a chiropractor case, which involves a limited non-surgical practice of medicine such as a naturopath; and this Court and the Court of Appeals holds that the practitioners of such limited system of the healing art have a right to come to Court and show whether or not the requirement of a state statute whereby such practitioners are required to be examined upon the general subjects, including surgery, which are required for an allopathic physician and surgeon to pass and obtain a license, amounts to a denial of their rights to follow a lawful occupation which is guaranteed to them under the Fourteenth Amendment to the Constitution of the United States. This is all that the Appellants seek, that is, their day in Court to prove their rights.

There is not a more substantial federal question than the quetion which involves the freedoms and liberties of the people of the United States, because this is the very precept upon which this country was founded and upon which the Constitution of the United States and its amendments are based.

Why should the entire field of the healing art be given over to the allopaths?

The opinions of the majority of the Court in the *England* case, supra, are masterpieces. The illuminating, sagacious and fundamental statements contained in the foregoing opinions marks the first time that a Court has undertaken to understand and develop the true meaning and need for medical freedom. These opinions herald a return of medical freedom and a wresting of the healing art from the monopolistic grip thereon that the allopaths have stealthily gained. The allopaths have so dominated and controlled the healing art that the modern generation knows of practically no medical treatment other than by drugs or surgery; sight has nearly been lost by today's generation of the highly successful cures of illness by the restoration of the human body to natural health by treatment by natural means as practiced by the naturopaths. The naturopaths whose philosophy is to treat the cause of illness by natural methods to put the human body back in balance and thus eliminate or prevent the illness is an age-old philosophy of medicine that should be preserved, and it should not be allowed to be strangled and destroyed by the Appellees. The aforesaid opinions in the *England*

case, supra, are like the rising of the sun on a new day for the natural health and happiness of the people of our nation.

These Appellants are entitled to the protection of their liberties and freedom guaranteed to them by the Constitution and its amendments and they are entitled to have their injunction against the attorney general of the State of Texas from interfering with these rights, liberties and freedoms and it is the duty of the Court to give its time to give this most substantial federal question full plenary consideration, to consider briefs thereon and to hear oral argument touching upon these most fundamental points and to render a proper decision on this very vital subject which has nationwide interest and which affects the health and welfare of so many people throughout our country. These Appellants truly believe that if this Court will render its decision granting them their right to have their day in Court as this Court has previously done in the *England* case, supra, that they will be able to duly show and prove to the satisfaction of the Court that their rights, freedom and liberty guaranteed to them by the Fourteenth Amendment have been denied them by the Texas Medical Practice Act, and that such act is unconstitutional as to them, and that these Appellants are duly entitled to their injunction against the Attorney General of Texas from interfering with their pursuit of a lawful occupation. This Court could not consider more substantial federal questions than the ones involved in this case.

WHEREFORE, these Appellants pray that the decision of this Court rendered on January 11, 1960 be set aside and that a notation be made on the docket of this case of probable jurisdiction and that this Court set this matter down for plenary consideration, that briefs be submitted and that counsel come before this Court and present oral arguments for a resolution of the timely and substantial federal questions involved and that this Court enter its final order reversing the decision of the United States District Court for the Northern District of Texas with instructions that a three-judge court be appointed to hear the case on its merits under the provisions of *Title 28, U. S. C. A. Sections 2281 and 2284;* with the further instruction that naturopathy is a lawful occupation; that naturopathy is a limited field of the healing art; that naturopathic practitioners in order to practice should not be required to qualify for and obtain a regular medical license required of allopathic physicians and surgeons because to do so would be illegally and arbitrarily interfering with the naturopathic limited school of medicine and the placing of unreasonable and unnecessary restrictions and requirements upon a lawful occupation, and the imposition on the Appellants-Naturopaths of onerous burdens impossible to perform, not fairly applicable, unjustly discriminatory, and prohibited, and which will amount to a deprivation of the Appellants-Naturopaths rights, privileges and immunities to pursue their lawful occupation, all in violation of the Fourteenth Amendment to the Constitution of the United States, and that the three-judge court proceed on

the Appellants' First Amended Complaint and Petition for Temporary Injunction and Permanent Injunction under the Civil Rights Acts *(Title 42, U. S. C. A., Section 1983-85)* and for such other and further relief including that set forth in the Conclusion portion of the Jurisdictional Statement, to include both special and general relief; and or if this appeal is ultimately dismissed, that it be dismissed for want of jurisdiction because a three-judge court did not actually hear and determine this case in the district court; and/or that after the Decision of January 11, 1960 is set aside, that this Honorable Court await the decision of the Court of Appeals for the Fifth Circuit before proceeding further herein, and also any other order or relief, both in law and in equity, to which the Appellants are justly entitled.

Respectfully Submitted,

JAMES L. MCNEES, JR.,
407 Davis Building,
1309 Main Street,
Dallas, Texas,
RIverside 2-5200.

CERTIFICATE OF COUNSEL

I, JAMES L. McNEES, JR., attorney of record for the Appellants in this case, do hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

JAMES L. McNEES, JR.,
407 Davis Building,
1309 Main Street,
Dallas, Texas,
RIverside 2-5200.

PROOF OF SERVICE

I, James L. McNees, Jr., attorney of record for CHARLES D. STUART, et al., Appellants herein, and a member of the bar of the Supreme court of the United States, hereby certify that, on the day of February, A. D. 1960, I served copies of the foregoing Petition for Rehearing on the several parties in this case, as follows:

1. On WILL WILSON, Attorney General of the State of Texas, and TEXAS STATE BOARD OF MEDICAL EXAMINERS, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to JOHN WILDENTHAL, JR., Assistant Attorney General of Texas, counsel of record for WILL WILSON, Attorney General of Texas, and the Texas State Board of Medical Examiners, and which envelope was addressed to HON. JOHN WILDENTHAL, JR., Assistant Attorney General of Texas, Capital Station, Austin, Texas.

2. On HENRY WADE, District Attorney of Dallas County, Texas, by mailing a copy in a duly addressed envelope, to HENRY WADE, Criminal District Attorney, County Courthouse, Dallas, Texas.

JAMES L. MCNEES, JR.,
Attorney for Charles D. Stuart, et al., Appellants.
407 Davis Building,
1309 Main Street,
Dallas, Texas,
RIverside 2-5200.

FILE COPY

No. 495

In the

Supreme Court of the United States

OCTOBER TERM, 1959

CHARLES D. STUART, *et al.*,

Appellants,

v.

WILL WILSON, Attorney General of Texas,

and

TEXAS STATE BOARD OF MEDICAL EXAMINERS,

and

HENRY WADE, District Attorney of Dallas County, Texas,

Appellees.

On Appeal From the United States District Court for the Northern District of Texas, Dallas Division

APPELLANTS PETITION FOR REHEARING AND OR MOTION TO RECALL AND AMEND JUDGMENT

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On Appeal From the United States District Court for the Northern District of Texas, Dallas Division

APPELLANTS PETITION FOR REHEARING AND/OR MOTION TO RECALL AND AMEND JUDGMENT

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

Respectfully presented herewith is the Appellant's petition for Rehearing of the Judgment rendered herein by this Honorable Court on January 11, 1960 and of this Honorable Court's Order denying Appellant's Motion for Rehearing which was entered on February 29, 1960 and/or their

Motion to Recall the Judgment rendered herein on January 11, 1960 and for Amendment of said Judgment so that said Judgment will read as follows:

> *"The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction because a three-judge Federal District Court did not hear the case nor render the judgment from which the direct appeal is sought".*

The Appellants in thise cause, with due humilitation, feel that they have not properly brought to the attention of this Honorable Court the error which Appellants complain of, hence this Petition and/or Motion.

Appellants hereby cast aside the chaff, and narrow the contents of this Petition and/or Motion to the one specific error which they complain of; and the Appellants petition and/or move this Honorable Court in the interest of fairness to consider this Petition and/or Motion so that they can be relieved of what they hereby allege as a manifest injustice cast upon them by the Judgment of this Honorable Court which was entered on January 11, 1960 and the subsequent refusal of this Honorable Court to entertain the Appellants' Petition for Rehearing. (See action of this Honorable Court in *Cahill v. New York, N. H. & H. R. Co., 1956, 76 S. Ct. 758, 351 U. S. 183, 100 L. Ed. 845).*

This one specific error which Appellants contend is an unfairness and manifest injustice to them is the ground which this Honorable Court sets forth as the basis for dismissing the attempted direct appeal to this Honorable Court.

Appellants do not complain of the action of this Honorable Court in dismissing the appeal; as a matter of fact, Appellants agree with and concur in the action of this Honorable Court in dismissing the attempted direct appeal. As stated above, the error of which these Appellants complain is the ground assigned by this Honorable Court as the basis for the dismissal. The Appellants filed a Motion to Dismiss this case because a three-judge Federal District Court was not convened and did not hear this case and did not render the judgment from which the direct appeal was sought. The Appellees cited as the ground for their Motion to Dismiss the case of *Stratton, Secretary of State of Illinois v. St. Louis S. W. Railway Company, 1930, 51 S. Ct. 8, 282 U. S. 10, 75 L. Ed. 135.* (This case is set forth in toto in Appendix II of Appellee's Motion to Dismiss or Affirm.) In the pertinent part of this decision this Honorable Court says as follows:

> "'If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement."

Thus the attempt by the Appellants to take a direct appeal to this Honorable Court under the provisions of *Section 1253 of Title 28, U. S. C. A.*, was clearly in error.

The Appellees urged no other ground for their Motion to Dismiss nor do they cite any other case in support thereof.

The Appellants agree that the aforesaid case of *Stratton, Secretary of State of Illinois v. St. Louis S. W. Railway Company, Supra,* is controlling on the point at issue; and as stated above the Appellants agree that this case should be dismissed because a three-judge Federal District Court did not hear and render the judgment from which a direct appeal is sought to this Honorable Court. Thus, Appellants wholeheartedly agree with, concur and approve that part of the Judgment of this Honorable Court which states, "The motion to dismiss is granted and the appeal is dismissed * * *", but as stated above the Appellants believe and urge upon this Honorable Court that the following wordage used in such Judgment, to-wit: "* * * for want of a substantial federal question", is unfair and creates a manifest injustice to the Appellants and cuts off their right of appeal to the Court of Appeals because the Judgment of this Honorable Court as it now reads in the case is tantamount to a dismissal upon the merits, when in truth and in fact the dismissal of this case by this Honorable Court, based upon Appellees' Motion to Dismiss, is for *want of jurisdiction because a three-judge Federal District Court did not hear and determine the judgment from which the direct appeal was sought,* all in accordance and in conformity with paragraph 1, (a) of Rule 16 of this Honorable Court which provides that, "The Court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules".

Appellants hereby earnestly and sincerely urge this Honorable Court to consider this Petition and/or Motion and correct the unfairness and manifest injustice caused them by this Honorable Court's Judgment whereby it granted the Appellees' Motion to Dismiss but assigned an entirely different ground therefor than that contained in the Appellees' Motion, and which Judgment of this Honorable Court indicates that it considered the direct appeal on its merits, when in fact and in law, under the decision of this Honorable Court in the *Stratton* case, *supra*, this Honorable Court would and should not accept jurisdiction of this case for any purpose and would and should not render any decision on the merits in the case, because the judgment from which the appeal is sought is not a judgment heard and rendered by a three-judge Federal District Court. In other words the Appellants agree with the Appellees' Motion to Dismiss on the ground that this direct appeal should be dismissed for want of jurisdiction because a three-judge Federal District Court did not hear and render the judgment from which the direct appeal is sought to this Honorable Court. Appellants would further mention that the Court of Appeals for the Fifth Circuit entered an order on February 17, 1960 dismissing an appeal to that court based upon this Honorable Courts' Judgment dismissing the direct appeal for want of a substantial federal question, and at the same time, the said Court of Appeals, considering the oral plea of Appellants' Counsel as to the unfairness of and the manifest injustice caused Appellants by this Honorable Court's judgment, provided in its order for a period of fif-

teen days after a final ruling is rendered in this case within which time Appellants may file a Petition for Rehearing in that court on the merits of this case. A copy of the Court of Appeals' Judgment is attached to this Petition and/or Motion as Appendix I.

WHEREFORE, Appellants pray that this Honorable Court grant this Petition for Rehearing and/or Motion for Recall of its Judgment and Orders and amend its Judgment of January 11, 1960 and the Order of this Honorable Court of February 29, 1960 refusing Appellants' Petition for Rehearing, and that this Honorable Court either set aside the aforementioned Judgment and Orders of this Honorable Court and/or that the certified copy of the Judgment and Orders of this Honorable Court which have been sent to the District Court be Recalled and/or amend said former Judgment and Orders of this Honorable Court and enter a new Judgment and/or Order and/or amend the same so that the Judgment of this Honorable Court instead of reading as follows:

> *"The Motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question".*

will be reentered and/or amended to read as follows:

> *"The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction because a three-judge Federal District Court did not hear the case nor render the judgment from which the direct appeal is sought".*

and for such other and further orders which this Honorable Court deems proper, either in law or in equity, and/or

any other special and/or general relief to which the Appellants may be justly entitled and for which they will forever pray.

Respectfully Submitted,

JAMES L. McNEES, JR.,
Counsel for Charles D. Stuart, et al., Appellants,
407 Davis Building,
1309 Main Street,
Dallas, Texas,
RIverside 2-5200.

CERTIFICATE OF COUNSEL

I, JAMES L. McNEES, JR., counsel of record for the Appellants in this case, do hereby certify that this Petition for Rehearing and/or Motion is presented in good faith and not for delay.

JAMES L. McNEES, JR.,
Counsel for Charles D. Stuart, et al., Appellants,

PROOF OF SERVICE

I, James L. McNess, Jr., Counsel of record for CHARLES D. STUART, et al., Appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the day of March, A. D., 1960, I served copies of the foregoing Petition for Rehearing and/or Motion on the several parties in this case, as follows:

1. On WILL WILSON, Attorney General of the State of Texas, and TEXAS STATE BOARD OF MEDICAL EXAMINERS, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to JOHN WILDENTHAL, JR., Assistant Attorney General of Texas, counsel of record for WILL WILSON, Attorney General of Texas, and the Texas State Board of Medical Examiners, and which envelope was addressed to HON. JOHN WILDENTHAL, JR., Assistant Attorney General of Texas, Capitol Station, Austin, Texas.

2. On HENRY WADE, District Attorney of Dallas County, Texas, by mailing a copy in a duly addressed envelope to HENRY WADE, Criminal District Attorney, County Courthouse, Dallas, Texas.

JAMES L. MCNEES, JR.,
Counsel for Charles D. Stuart, et al., Appellants,
407 Davis Building,
1309 Main Street,
Dallas, Texas,
RIverside 2-5200.

APPENDIX I

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 18031

CHARLES D. STUART, *et al.*,

Appellants,

v.

WILL WILSON, Attorney General of Texas, et al.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

ORDER:—

It appearing that the Supreme Court has already decided this case on appeal, the attempted appeal to this Court has become moot, and the same is dismissed. The time within which appellant may apply for a rehearing is extended so that any such application may be made within fifteen days after the ruling of the Supreme Court of the United States on the petition for rehearing filed in that Court.

Appeal dismissed.

Enter for the Court this February 17, 1960.

(Signed) RICHARD T. RIVES,
CHIEF JUDGE, U. S. COURT OF
APPEALS, FIFTH CIRCUIT.

(ORIGINAL FILED FEBRUARY 17, 1960)